









**Collectanea Juridica.**  
CONSISTING OF  
**TRACTS,**  
RELATIVE TO THE  
**LAW AND CONSTITUTION**  
OF  
**ENGLAND**  
VOLUME THE FIRST.

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SPARSÆ COLLIGIMUS.

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## P R E F A C E.

IT is generally known to those who are most conversant with the materials of legal literature, that a considerable portion of the labours of many eminent Lawyers of former times remain in a great measure useless to the purposes of instruction and improvement, for want of being diffused by means of the press, so as to meet the more general notice of the Profession. Some Treatises of acknowledged excellence, and of great authority, which have formerly promoted the study of the Law\*, and which have been occasionally consulted and relied upon in the composition of some of the most authentic books in that science, are now lost; and others, which at this time serve to adorn the libraries and to gratify the curiosity of their possessors, may, probably from the same cause, be wholly lost, or remain useless to posterity. Instances of this kind occur frequently in going over the books

\* A Reading on the important statute, Westm. H. c. 1. De Donis Conditionalibus, by Sir Thomas Littleton, author of the Treatise on Tenures, quoted by Lord Coke in his Commentary as extant in his time. may probably be found in some of our public libraries, and would be a desirable acquisition.

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of Reports now printed, wherein it appears, that authorities formerly extant in solemn decisions of the courts, and accordingly quoted in support of later determinations, are now no longer to be found, from the very imperfect manner of collecting the Law Annals or Year Books, which, by whatever authority they may have originally been composed, are come to our hands in a very imperfect and mutilated state, notwithstanding the very ample materials which our public libraries afford of supplying the deficiencies \*.

Among other instances it is to be regretted, that a great part of the learned compositions of that venerable ornament of the law Lord HALE have never yet reached the hands of the Public †; a reasonable hope may however be entertained from the general estimation in which his writings are held, and the hands in which some of them are said to remain, that they will hereafter enlarge the stock of legal learning, and extend the reputation of their author. And, without recurring back to former times, it must necessarily happen under the present want of regulation for an authentic and a continued publication of the Adjudications of our

\* A considerable series of Law Annals, particularly of Edw. III. wanting in the printed edition of the Year Books, is extant in a very fair MS. in the Inner-Temple library.

† Several valuable Tracts of this Author have been lately made public in Mr. HARGRAVE'S COLLECTION OF LAW TRACTS.

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Courts of Law, that many important authorities will be left to float on the uncertain surface of tradition, which might prove of general utility and advantage, if properly recorded.

This Publication is therefore intended to supply, in some degree, a repository for the preservation of such portions of scattered literature as relate to our Constitution and form of Government, the Theory and Practice of the Law, the Jurisdiction of the several Courts, and of such Authorities and Determinations of the Courts as have wholly escaped the attention of our Reporters, or which are but slightly or imperfectly recorded in their books; with other special Arguments and Opinions in Cases of difficulty and importance. Of all these the present Volume will, it is presumed, be found to contain instances of sufficient weight and consequence to recommend it to the attention of the more studious and intelligent part of the profession, and to convey its own apology for extending the materials of the lawyer's library.

The numerous accessions of Law Books which are daily created by the accumulation of new statutes, with the many determinations upon them, and the rules of court regulating the practice therein, necessarily demand the attention of the modern lawyer, to whom it is found to be essentially useful to be apprised of the means of knowledge in the several branches of the law, which are thus occasionally supplied by the labour and industry of those who have

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have applied their talents to the purposes of such information. This intelligence, we apprehend, is more particularly desirable to those who reside at a distance from the Courts at Westminster, and, in the several dependencies of our government abroad, for whose more peculiar information therefore our REGISTER OF LAW PUBLICATIONS is calculated, by pointing out, every Term, all such new publications, accompanied with a general account (where it seems necessary) of the contents and mode of treating each subject; with such other particulars as may enable every one to form a previous opinion of any purchase he may think proper to make. This, though a secondary object of our plan, we presume to hope, will prove a desirable part of it. It remains only to assure our Readers, that from the approbation and communications which our Undertaking has met with in the course of the several Periodical Publications of which it consists, we are become possessed of Original Materials for several ensuing volumes.

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## TO CORRESPONDENTS.

*WE* feel great pleasure in making our acknowledgments for the several communications which have been already received, and for the assurances of further favours towards enlarging our stock of original materials, which we have met with from several respectable Gentlemen in the profession, who have expressed their intention of promoting this Publication.

To our Correspondent A. Z. who makes us the offer of some papers on constitutional subjects of law of the time of James I. we shall be much obliged by the communication of them; but as probably some among them will be found already in print, and as it is our intention to be very sparing of insertion of such articles, it will be proper to make such a selection as will best answer the purposes of original information and general instruction.

Our Well-wisher at Cambridge, who is particularly desirous of the opinions and arguments of Counsel on difficult points of law, will, we trust, be disposed to give us additional credit for the very valuable materials of that kind with which we have been favoured in the present publication, as well as for others which are in preparation to be brought forward.





## CASE OF COMMENDAMS.

*THE following Paper contains an account of a singular passage in the history of our judicature, and the administration of justice. In the CASE of COMMENDAMS, 10. Ja. 1. which is reported in Hobart 140. under the name of Colt and Glover versus the Bishop of Coventry and Litchfield, in Moor 898. and 1. Roll. 451. some positions were laid down by Serjeant Chiborne, which were represented to his Majesty by Dr. Bilson, then Bishop of Winchester, as very injurious to the King's prerogative; namely, that the Translation of Bishops was contrary to the canon law; secondly, that the King had no power to grant Commendams but in case of necessity, which necessity could never happen, because no man was bound to keep up hospitality beyond his means. JAMES, ever jealous of his prerogative, took alarm at these dangerous doctrines; and determined not to suffer any further argument upon points so nearly concerning his royal dignity, directed his then Attorney-general, Sir Francis Bacon (who seems to have acted as his principal adviser in this measure), to signify his pleasure to the Lord Chief Justice, Sir Edward Coke, that he held it necessary himself should be consulted, before the Judges proceeded further in the argument, which was soon to be had in the Exchequer Chamber.*

*The following account is the proceeding in the Council, and is supposed to be drawn up by Sir Francis Bacon himself, not only from the mention he makes, in a letter to Sir George Villiers, of a draught he had made for that purpose, but as may be suspected from the style and manner of it. A copy of this tract has already been printed very incorrectly in a quarto*

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*volume inserted, "Letters of Sir Francis Bacon," printed 1702, page 149. It has now been collated with the original entry in the Council-book; and is brought forward to the notice of persons curious in the history of the law and of law proceedings.*

*The following letter, written by Sir Francis Bacon to King JAMES (extracted from Cabala, p. 72.), will best open the scene that will be exhibited in the proceedings at the Council-board :*

SIR FRANCIS BACON, THE KING'S ATTORNEY,  
TO THE KING, GIVING ACCOUNT TOUCHING THE  
COMMENDAMS.

"IT MAY PLEASE YOUR MOST EXCELLENT MAJESTY,

"I AM not swift to deliver any thing to your majesty before it be well weighed : but now that I have informed myself of as much as is necessary, touching this proceeding of the judges to the argument of the commendams, (notwithstanding your majesty's pleasure signified by me upon your majesty's commandment, in presence of my lord chancellor and the bishop of Winchester, to the contrary), I do think it fit to advertise your majesty what hath passed ; the rather because I suppose the judges, since they performed not your commandment, have at least given your majesty their reasons of failing therein ; I being to answer for the doing of your majesty's commandment, and they for the not doing.

"I did conceive that in a cause that concerned your majesty, and your royal power, the judges, having heard your attorney-general argue the Saturday before, would of themselves have taken farthest time to be advised.

"And (if I fail not in memory) my lord Coke received from your majesty's self, as I take it, a precedent commandment, in Hilary term, that both in the *rége inconsulto*, and in the commendams, your attorney should be heard to speak, and then stay to be made of farther proceeding till my lord had spoken with your majesty.

"Nevertheless, hearing that the day was appointed for the judges argument, contrary to my expectation, I sent on Thursday in the evening (having received your majesty's commandment but the day before in the afternoon) a letter to my lord Coke, whereby I let him know, that upon some request of my lord of Winchester (who by your commandment was present at the argument) of that which passed, it was your majesty's express pleasure that no farther pro-

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“ceeding should be, until your majesty had conferred with your judges; which your majesty thought to have done at your being now last in town; but by reason of your many and weighty occasions, your princely times would not serve; and that it was your pleasure he should signify so much to the rest of the judges, wherof his lordship might not fail. His answer by word to my man was, that it were good the rest of the judges understood so much from myself. Whereupon I (that cannot skill in scruples in matter of service) did write on Friday three several letters of like content to the judges of the common pleas, and the barons of the exchequer, and the other three judges of the king’s bench, mentioning in that last my particular letter to my lord chief justice.

“This was all I did, and thought all had been sure, in so much as the same day being appointed in chancery for your majesty’s great cause, (followed by my lord Hauldon) I writ two other letters to both the chief justices, to put them in mind of assisting my lord chancellor at the hearing. And when my lord chancellor himself took some notice upon that occasion, openly in the chancery, that the commendams could not hold, presently after I heard the judges were gone about the commendams; which I thought, at first, had been only to adjourn the court; but I heard after that they proceeded to argument.

“In this their doing, I conceive they must either except to the nature of the commandment, or to the credence thereof; both which, I assure myself, your majesty will maintain.

“For if they should stand upon the general ground, *nulli negabimus, nulli differemus justitiam*, it receiveth two answers: the one, that reasonable and mature advice may not be confounded with delay; and that they can well alledge, when it pleaseth them: the other, that there is a great difference between a case merely between subject and subject, and where the king’s interest is in question directly or by consequence. As for the attorney’s place, and commission, it is as proper for him to signify the king’s pleasure to the judges, as for the secretary to signify the same to the privy council; and so hath it ever been.

“These things were a little strange, if there came not so many of them together, as the one maketh the other seem less strange: but your majesty hath fair occasions to remedy all with small aid. I say no more for the present.

“I was a little plain with my lord Coke in these matters; and when his answer was, that he knew all these things,—I said, he could never profit too much in knowing himself and his duty.”

*The firm conduct held by the Chief Justice on this occasion was, no doubt, the immediate cause of the disgrace that soon*

**CASE OF COMMENDAMS.**

*came upon him; for on the 30th of the same June he was suspended from the execution of his office; on the 26th July, he was censured before the Privy Council, one of the charges against him being his conduct on this business of the Commendams; and on the 15th of November Sir Henry Montague was appointed Chief Justice in his place.*

At WHITEHALL, 6 JUNE, 1616.

P R E S E N T :

THE KING'S MAJESTY.

LO. ARCHBISHOP OF CANT.	LO. CHANCELLOR,
LO. TREASURER,	LO. WOOLSTON,
LO. PRIVY SEAL,	LO. STANHOPE,
LO. STEWARD,	MR. VICE CHAMBERLAIN,
LO. CHAMBERLAIN,	MR. SECRETARY WINWOOD,
LO. VISC. FENTON,	MR. SECRETARY LAKE,
LO. BIS. OF WINCHESTER,	MR. CHAN. OF THE EXCHEQ.
LO. ZOUCH,	MASTER OF THE ROLLES.
LO. KNOLLIS,	

HIS majesty having this day given order for a meeting of the council, and that all the judges, being twelve in number, should be sent for to be present; when the lords were sat, and the judges ready attending, his majesty came himself in person to council, and opened to them the cause of that assembly; which was, that he had called them together concerning a question that had relation to no private person, but concerning God and the king, the power of his crown, the state of his church, whereof he was protector; and there was no fitter place to handle it, than at head of his council-table. That there had been a question pleaded and argued concerning commendams; the proceeding wherein had been either misreported or mishandled, for his majesty, a year since, had received advertisements concerning the cause in two extremes: by some, that it entrenched into his prerogative royal in the general power of granting commendams; and by others, that the



doubt reflect only upon a special nature of a commendam; such as, in respect of the incongruity and exorbitant form thereof, might be questioned without impeaching or weakening the general power at all.

WHEREUPON his majesty, willing to know the true state thereof, commanded the lord bishop of Winchester, and mr. secretary Winwood, to be present at the next argument, and to report the state of the question and proceeding to his majesty. But mr. secretary Winwood being absent by occasion, the lord of Winchester was only present, and made information to his majesty of the particulars thereof, which his majesty commanded him to report to the board. Whereupon the lord of Winchester stood up and said, serjeant *Chiborne*, who argued the case against the commendams, had maintained divers positions and assertions very prejudicial to his majesty's prerogative royal: as, first, that the translation of bishops was against the canon law, and, for authority, vouched the canons of the council of Sardis; that the king had not power to grant commendams but in case of necessity; that there could be no necessity, because there was no need of augmentation of livings, for no man was bound to keep hospitality above his means; besides many other parts of his argument tending to the overthrow of his majesty's prerogative in case of commendams.

THE lord of Winchester having made his report, his majesty resumed his former narrative, letting the lords know, that after the lord of Winton had made unto his majesty a report of that which passed at the argument of the cause, like in substance unto that which had been now made, his majesty, apprehending the matter to be of so high a nature, commanded his attorney general to signify his majesty's pleasure unto the lord chief justice, that in regard of his majesty's other most weighty occasion, and for that his majesty held it necessary, upon the lord of Winchester's report, that his majesty be first consulted with, before the judges proceeded to argument, therefore the day appointed

for

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for the judges arguments should be put off till he might speak of it to his majesty; and this letter of his majesty's attorney was, by his majesty's commandment, openly read as followeth *in hæc verba*:

“ MY LORD,

“ IT is the king's exprefs pleasure that, because his majesty's time would not serve to have conference with your lordship and his judges, touching the case of commendams, at his last being in town, in regard of his majesty's other most weighty occasions, and for that his majesty hath held it necessary, upon the report which my lord of Winchester (who was present at the last argument by his majesty's royal commandment) made to his majesty, that his majesty be first consulted with ere there be any further proceedings by argument, by any of the judges, or otherwise; therefore that the day appointed for the further proceedings by argument of the judges in that case be put off till his majesty's further pleasure be known upon consulting with him; and to that end that your lordship forthwith signify his commandment to the rest of the judges; whereof your lordship may not fail; and so I leave your lordship to God's goodness.

Your lordship's loving friend to command,  
*This Thursday, at afternoon,* FRANCIS BACON.”  
*the 25th of April, 1616.*

“ THAT upon this letter received, the lord chief justice returned word to his majesty's said attorney, by his servant, that it was fit the rest of his brethren should understand his majesty's pleasure, immediately, by letter from his said attorney to the judges of the several benches; and accordingly it was done. Whereupon all the said judges assembled, and by their letter under their hands certified his majesty that they held those letters, importing the signification aforesaid, to be contrary to law, and such as they could not yield to the same by their oaths; and that thereupon they had proceeded

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at the day, and did now certify his majesty thereof. Which letter of the judges his majesty also commanded to be openly read, the tenor whereof followeth *in hæc verba*:

“ MOST DREAD AND MOST GRACIOUS SOVEREIGN,

“ IT may please your most excellent majesty to be advertised, that this letter, inclosed was delivered to me, your majesty's chief justice, on Thursday last, in the afternoon, by a servant of your majesty's attorney general; and letters of like effect were, on the day following, sent from him, by his servant, to us your majesty's other justices of every of your courts at Westminster. We are, and ever will be ready, with all faithful and true hearts, according to our bounden duties, to serve and obey your majesty, and think ourselves most happy to spend our lives and abilities to do your majesty true and faithful service in this present case mentioned in this letter. What information hath been made unto you, whereupon mr. attorney doth ground his letter from the report of the bishop of Winchester, we know not. This we know, that the true substance of the cause summarily is this: It consisteth principally upon the construction of two acts of parliament, the one of the 25th year of king Edward III. and the other of the 25th year of king Henry VIII. whereof your majesty's judges upon their oaths, and according to their best knowledge and learning, are bound to deliver the true understanding faithfully and uprightly; and the cases between subjects, for private interest and inheritance, earnestly called on us for justice and expédition. We hold it our duties to inform your majesty that our oath is in these express words: *That in case any letters came unto us contrary to law, we do nothing by such letters, but certify your majesty thereof, and go forth to do the law notwithstanding the same letters.* We have advisedly considered of the said letters of mr. attorney, and with one consent do hold the same to be contrary to law, and that we could not yield to the same by our oath; assuredly per-

suading

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suading ourselves of your majesty being truly informed that it standeth not with your royal and just pleasure to give way to them; and therefore, knowing your majesty's zeal to justice, and to be most renowned therefore, we have, according to our oaths and duties, at the open day prefixed the last term, proceeded, and thereof certified your majesty. We shall ever pray to the Almighty for your majesty, in all honour, health and happiness, long to reign over us.

Your most humble and faithful  
subjects and servants,

EDW. COKE,  
HENRY HOBART,  
LAWR. TANFELD,  
P. WARBURTON,  
GEO. SNIGGE,  
JAMES ALTHAM,

EDW. BROMLEY,  
JO. CROKE,  
H. WINCHE,  
JOHN DODDRIDGE,  
AUGUSTINE NICOLLS,  
ROBERT HOUGHTON."

*Serjeants'-Inn, 27th of April, 1606.*

His majesty having considered of this letter, did by his princely letters return answer, reporting himself to their own knowledge and experience, what princely care he had ever had, since his coming to the crown, to have justice duly administered to his subjects with all possible expedition; and how far he was from crossing or delaying of justice, where the interest of any private party was questioned; but on the other side expressing himself, that where the case concerned the high powers and prerogatives of his crown, he would not endure to have them wounded through the sides of a private person; admonishing them also of a custom lately entertained of a greater boldness, to dispute the high points of his majesty's prerogative, in a popular and unlawful liberty of argument, more than in former times; and making them perceive also how weak and impertinent the pretence of allegation of their oath was in a case of this nature, and how well it might have been spared; with many other weighty points in the said letter

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ter contained: which letter also, by his Majesty's commandment, was publicly read in *hæc verba*:

“ JAMES REX.

“ TRUSTY and well-beloved counsellors, and trusty and well beloved, we greet you well. We perceive by your letter that you conceive the commandment given you by our attorney general, in our name, to have proceeded upon wrong information; but if ye list to remember what princely care we have ever had, since our coming to this crown, to see justice duly administered to our subjects with all possible expedition, and how far we have ever been from urging the delay thereof in any sort, ye may safely persuade yourselves, that it is no small reason that moved us to send you that direction. Ye might very well have spared your labour in informing us of the nature of your oath; for although we never studied the common law of England, yet we are not ignorant of any points which belong to a king to know. We are therefore to inform you hereby, that we are far from crossing or delaying any thing which may belong to the interest of any private party in this case; but we cannot be contented to suffer the prerogative royal of our crown to be wounded through the sides of a private person. We have no care at all which of the parties shall win his process in this case, so the right prevail, and that justice be truly administered; but, upon the other part, we have reason to foresee that nothing be done in this case which may wound our prerogative in general; and therefore, so that we may be sure that nothing shall be debated amongst you which may concern our general power of not giving commendams, we desire not the parties to have an hour's delay of justice; but that our prerogative should not be wounded in that regard, for all times hereafter, upon pretext of private parties' interest, we sent you that direction; which we account to be wounded as well if it be publicly disputed upon, as if any sentence were given against it. We are therefore to admonish you

you, that since the prerogative of the crown hath been more boldly dealt withall in Westminster-hall, during the time of our reign, than ever it was before in the reigns of divers princes immediately preceding us, we will no longer endure that popular and unlawful liberty; and therefore were we justly moved to send you that direction to forbear to meddle any further in a case of so tender a nature till we had further thought upon it. We have cause indeed to rejoice of your zeal for the speedy execution of justice, but we would be glad that all our good subjects might so find the fruit thereof, as that no pleas before you were of older date than this is. But as to the argument which you found upon your oath, you give our predecessors, who first founded that oath, a very uncharitable meaning, in perverting their intention and zeal to justice, to make a weapon of it to use against their successors. For although your oath be, that you shall not delay justice between any private parties; yet was it not meet that the king should receive harm thereby before he be forewarned thereof. Neither can you deny but that every term you will, out of your own discretions, for reasons known unto you, put off either the hearing or determining of any ordinary cause betwixt private persons till the next term following.

“OUR pleasure therefore is, who are the head and fountain of justice under God in our dominions, and we, out of our absolute authority royal, do command you, that you forbear to meddle any further in this plea till our coming to the town, and that out of our own mouth you may hear our pleasure in this business. Which we do only out of the care we have, that our prerogative may not receive any unwitting and indirect blow, and not to hinder justice to be ministered to any private parties, which no importunities shall persuade us to move you in; as only for the avoiding of unreasonable importunities of suitors in their own particular, that oath was, by our predecessors, ordained to be ministered unto you. So we wish you heartily well to fare.

“ POST-

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“**POSTSCRIPT.** You shall, upon the receipt of this our letter, call our attorney general unto you, who will inform you of the particular points which we are unwilling should be publicly disputed of in this case.”

THIS letter being read, his majesty resorted to take into his consideration the parts of the judges' letter and other their proceeding in that cause, and the errors therein committed and contained; which errors his majesty did set forth to be both in matter and manner. In matter, as well by way of *omission* as *commission*.

FOR *omission*, that it was a fault in the judges, that when they heard a counsellor at the bar presume to argue against his majesty's prerogative, which in this case was in effect his supremacy, they did not interrupt him, and reprove sharply that loose and bold course of disaffirming or impeaching things of so high a nature by discourse; especially since his majesty hath observed that, ever since his coming to this crown, the popular-fort lawyers have been the men that most affrontedly, in all parliaments, have trodden upon his prerogative; which being most contrary to their vocation of any men, since the law nor lawyers can never be respected if the king be not revered, it therefore best became the judges, of any, to check and bridle such impudent lawyers, and in their several benches to disgrace them, that bear so little respect to the king's authority and prerogative. That his majesty had a double prerogative; whereof the one was ordinary, and had relation to his private interest, which might be, and was, every day disputed in Westminster-hall; the other was of a higher nature, referring to his supreme and imperial power and sovereignty, which ought not to be disputed or handled in vulgar argument: but that of late the courts of the common law were grown so vast and transcendent, as they did both meddle with the king's prerogative, and had incroached upon all other courts of justice,

justice, as the *high commission*, the *council established in Wales*, and at *York*, the court of requests.

CONCERNING that which might be termed *commission*, his majesty took exception to the judges' letter both in matter and form. For matter, his majesty did plainly demonstrate, that whereas it was contained in the judges' letter, that the signification of his majesty's pleasure, as aforesaid, was contrary to law, and not agreeable to the oath of a judge, that could not be.

FIRST, for that the putting off the hearing, or proceeding upon just and necessary causes, is no denying or delaying of justice, but wisdom and maturity of proceeding; and that there cannot be a more just and necessary cause of stay, than the consulting with the king where the cause concerns the crown; and that the judges did daily put off causes upon lighter occasions. Likewise his majesty did desire to know of the judges how this calling them to consult with him was contrary to law, which they never could answer unto.

SECONDLY, That it was no bare supposition or surmise that this case concerned the king's prerogative, for that it had been directly and largely disputed at the bar; and the very disputing thereof in a public audience, is both dangerous and dishonourable to his majesty.

THIRDLY, That the manner of the putting off which the king required, was not infinite, nor for long time, but grounded upon his majesty's weighty occasions, which were notorious; by reason whereof he could not speak with the judges before the argument; and that there was a certain expectation of his majesty's speedy return at Whitsuntide; and likewise, that the case had been so lately argued, and could not receive judgment till Easter term next, as the judges themselves afterwards confessed.

AND lastly, Because there was another just cause of absence for the two chief justices, for that they ought to have assisted the lord chancellor the same day in a great cause of the king's, followed by the lord Hunston against the

the



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the lord William Howard in chancery; which cause of the king's, specially being so weighty, ought to have had precedence before any cause betwixt party and party.

ALSO, whereas it was contained in the judges' letter, that the case of the commendams was but a cause of private interest between party and party, his majesty shewed plainly the contrary, not only by the argument of serjeant *Ciborne*, which was before his commandment, but by the argument of the judges themselves, namely, justice *Nitolls*, which was after; but specially, since one of the parties is a bishop, who pleads for the commendam by virtue of his majesty's prerogative.

ALSO, whereas it was contained in the judges' letter that the parties called upon them earnestly for justice, his majesty conceives it to be but a pretence; urging them to prove that there was any solicitation by the parties for expedition, otherwise than in an ordinary course of attendance, which they could never prove.

As for the form of the letter, his majesty noted that it was a new thing, and very undecent and unfit for subjects to disobey the king's commandment; but most of all to proceed in the mean time, and to return to him a bare certificate: whereas they ought to have concluded with the laying down and representing of their reasons modestly unto his majesty, why they should proceed; and so to have submitted the same to his princely judgment, expecting to know from him, whether they had given him satisfaction.

AFTER this his majesty's declaration, all the judges fell upon their knees and acknowledged their error for matter of *form*, humbly praying his majesty's gracious favour, and pardon for the same.

BUT for the *matter* of the letter, the lord chief justice of the king's bench entered into a defence thereof; the effect whereof was, that the stay required by his majesty was a delay of justice, and therefore contrary to law and the judges' oath; and that the judges knew well amongst themselves that the case (as they meant to handle it) did not

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not concern his majesty's prerogative of grant of commendams; and that if the day had not been held by the not coming of the judges, the suit had been discontinued, which had been a failing in justice; and that they could not adjourn it, because mr. attorney's letter mentioned no day certain, and that an adjournment must always be to a day certain.

UNTO which answer of the chief justice his majesty did reply, that for the last conceit it was mere sophistry, for that they might in their discretions have prefixed a convenient day, such as there might have been time for them to consult with his majesty before the same, and that his majesty left that point of form to themselves.

AND for that other point, that they should take upon them peremptorily to discern, whether the case concerned the king's prerogative, without consulting with his majesty first, and informing his princely judgment, was a thing preposterous; for that they ought first to have made that appear to his majesty, and so to give him assurance thereof upon consultation with him.

AND as for the main matter, that it should be against the law, and against their oath, his majesty said he had spoken enough before: unto which the lord chief justice, in effect, had made no answer; but only insisted upon the former opinion; and therefore the king required the lord chancellor to deliver his opinion upon that point, whether the stay that had been required by his majesty were contrary to law, or against the judges' oath.

THE lord chancellor stood up and moved his majesty, that because this question had relation to matter of law, his majesty would be informed by his learned counsel first, and they first to deliver their opinions; which his majesty commanded them to do.

THEREUPON his majesty's attorney general gave his opinion, that the putting off the day in manner as was required by his majesty, to his understanding, was, without all scruple, no delay of justice, nor danger of the judges' oath;

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oath; insisting upon some of the reasons which his majesty had formerly opened; and adding, that the letter he had writ in his majesty's name was no imperious letter, as to say, that his majesty, for certain causes, or for causes known to himself, would have them put off the day, but fairly and plainly expressed the causes unto them; for that the king conceived, upon the lord of Winchester's report, that the cause concerned him, and that his majesty willingly would have spoken with them before, but by reason of his important business could not, and therefore required a stay till they might conveniently speak with him, which they knew could not be long: and in the conclusion of his speech wished the judges seriously to consider with themselves, whether they were not in greater danger of breach of their oath by their proceeding, than they would have been by their stay; for that it is part of their oath to counsel his majesty when they are called; and if they will proceed in a business first, whereupon they are called to counsel, and will counsel him when the matter is past, it is more than a simple refusal to give him counsel. And so concluded his speech; and the rest of the learned counsel consented to his opinion.

WHEREUPON the lord chief justice of the king's bench, answering nothing to the matter, took exception that the king's counsel learned should plead or dispute with the judges; for, he said, they were to plead before the judges, and not to dispute with them. Whereunto the king's attorney replied, that he found that exception strange, for that the king's learned counsel were by oath and office, and much more when they had the king's express commandment, without fear of any man's face, to proceed or declare against any the greatest peer or subject of the kingdom; and not only any subject in particular, but any body of subjects or persons, were they judges, or were they an upper or lower house of parliament, in case that they exceed the limits of their authority, or take any thing from his majesty's royal power or prerogative. And so concluded, that

that this challenge, and that in his majesty's presence, was a wrong to their places, for which he and his fellows did appeal to his majesty for reparation. And hereupon his majesty did affirm, that it was their duty so to do, and that he would maintain them therein, and took occasion afterwards again to speak of it; for when the lord chief justice said he would not dispute with his majesty, the king replied, "that the judges would not dispute with him, nor his learned counsel might not dispute with them; so, whether they did well or ill, it must not be disputed."

AFTER this the lord chancellor delivered his opinion plainly and clearly, that the stay that had been by his majesty required was not against law, nor any breach of the judges' oath, and required that the oath itself might be read out of the statute\*; which was done by the king's solicitor, and all the words thereof weighed and considered. Thereupon his majesty and the lords thought good to ask the judges severally their opinions; the question being put in this manner, *Whether if, at any time, in a case depending before the judges, which his majesty conceived to concern him, either in power or in profit, and thereupon required to consult with them, that they should stay proceeding in the mean time, they ought not to stay accordingly?* They all (the lord chief justice only excepted) yielded, that they would, and acknowledged it to be their duty so to do; only the lord chief justice of the king's bench said for answer, "that when that case should be, he would do that should be fit for a judge to do;" and the lord chief justice of the common pleas, who had assented with the rest, added, "that he would ever trust the justice of his majesty's commandment." After this was put to a point, his majesty thought fit, in respect of the further day of argument appointed the Saturday following for the commendams, to know from his judges what he might expect from them concerning the same. Whereupon the lord of Canterbury breaking the case into

\* See Stat. 13. Edward 3. st. 4.

some questions, his majesty did require his judges to deal plainly with him, whether they meant in their argument to touch the general power of granting commendams, yea or no. Whereupon all the said judges did promise and assure his majesty, that in the argument of the said case of commendams, they would speak nothing which should weaken or draw into doubt his majesty's prerogative for the granting of them; but intended particularly to insist upon the point of the lapse, and other individual points of the case, which they conceived to be of a form differing from all other commendams which have been practised.

THE judges also went further, and did promise his majesty that they would not only abstain from speaking any thing to weaken his majesty's prerogative of commendams, but would directly, and in plain terms, affirm the same, and correct the erroneous and bold speeches which had been used at the bar in derogation thereof. Also all the judges did in general acknowledge and profess, with great forwardness, that it was their duty, if any counsellor at the bar presumed at any time to call in question his majesty's high prerogative and regalities, that they ought to reprehend them and silence them; and all promised so to do hereafter.

LASTLY, the two judges which were then next to argue, mr. justice *Doddridge* and mr. justice *Winche*, opened themselves unto his majesty thus far, that they would insist chiefly upon the lapse, and some points of uncertainty, repugnancy, and absurdity, being peculiar to this commendam; and that they would shew their dislike of that which had been said at the bar for the weakening of the general power. And mr. justice *Doddridge* said, that he would conclude for the king, that the church was void and in his majesty's gift. He also said, that the king might give a commendam to a bishop, either before or after his consecration, and that he might either give it him during his life, or for a certain number of years.

THE judges having thus far submitted and declared themselves, his majesty admonished them to keep the bounds and limits of their several courts, not to suffer his prerogative to be wounded by rash and unadvised pleading before them, or by new inventions of law; for as he well knew that the true and ancient common law is the most favourable for kings of any law in the world, so he advised them to apply themselves to the study and practice of that ancient and best law, and not to extend the power of any of their courts beyond their due limits, following the precedent of the best ancient judges in the times of the best government; and that they might assure themselves that he, for his part, in his protection of them and expediting of justice, would walk in the steps of the ancient and best kings. And thereupon he gave them leave to proceed in their argument.

WHEN the judges were removed, his majesty, that had forborne to ask the votes and opinions of his council before the judges, because he would not prejudice the freedom of the judges' opinions concerning the point, whether the stay of proceedings that had been by his majesty required could, by any construction, be thought to be within the compass of the judges' oath (which they had heard read unto them), did then put the question to his council; who all with one consent did give opinion, that it was far from any colour or shadow of such interpretations, and that it was against common sense to think the contrary; especially since there is no mention made in their oath of delay of justice, but only that they should not deny justice, nor be moved by any of the king's letters to do any thing contrary to law or justice.

*G. Cant. T. Ellesmere, Canc. T. Suffolke. E. Worcester. Lenox. Nottingham. Pembroke.*

*W. Knollis.*

*John Digbye. Raphe Winwode. Tho. Lake. Fulk Grevill. Jul. Caesar. Fr. Bacon.*

## No. II.

*THE tract which follows seems to have been written (as may be collected from a note in the margin) some time before the death of Mr. Selden. It has been printed before at the end of the Chancery Reports, but very incorrectly. A great part of this tract is of the time of James I. being an account of what was done in the Privy Council, and by the King's learned Council, on the Question of the Jurisdiction of the Court of Chancery, which arose in 1615, during the time of Lord Ellesmere and Lord Chief Justice Coke. This dispute originated somewhat prior to the Case of Commendams, but did not come to a conclusion till the 14th July 1616; when the King gave his judgment thereon in Council, after having heard the opinions of his learned Council. Among these was Sir Francis Bacon, who upon this occasion took a lead, not only in the open proceeding as a Law Officer, but by letters of private advice to his Majesty; a sort of communication on which he seemed anxious to rest his pretensions to the merit of a useful and zealous servant of the Crown. A letter of his on this subject is to be found in the Cabala (p. 28.), which deserves perusal. But the better to follow the history of this transaction, we shall here give the Case in Chancery from whence the whole originated: it is the Case of Courtney versus Glanvill, reported in Moor 838. 2. Bulstrode 301. 1. Roll. 111. and in Croke James 343, which latter Report is as follows:*

## COURTNEY VERSUS GLANVILL.

*GLANVILL* (who was committed unto the Fleet the last day of Mich. Term, 11 Jac. for non-performance of a decree in chancery) upon a *habeas corpus* returned, the case was informed to be such: *Glanvill* sold to *Courtney*, being a young gentleman,

gentleman, a jewel, which he pretended to be of the value of 360*l.* whereas in truth it was worth but 20*l.* and three other jewels to the value of 100*l.*; and for his security he took a bond of 600*l.* in the name of one *Hampton*, and procured an action to be brought in the said *Hampton's* name, and the action to be confessed, and *Glanvill* paid all the charges of both parties; and the confession was out of court in the vacation. Afterwards *Courtney*, finding this deceit, that the jewel was not worth above 20*l.* which was delivered unto him at the rate of 360*l.* exhibited his bill in chancery for relief, and afterwards brought a writ of error to reverse this judgment, and the judgment was affirmed. Afterwards, upon an hearing in chancery, this cause was decreed, that *Glanvill* should take again his jewel and 100*l.* and that he should procure the said *Hampton* to release and acknowledge satisfaction: and for not performing this decree he was imprisoned. And *Coke*, chief justice, said, that this decree and imprisonment, being after a judgment at the common law, was unlawful, and that this court ought to relieve him; and for proof he cited a judgment, *Pasc. 5 Ed. 4. rot. 35.* betwixt *Cobb* and *More*, where *Cobb* procured an action of debt to be brought against *More*, and the action to be confessed by attorney; and a writ of error to be brought thereupon, and the judgment to be affirmed; and all this was done in the absence of *More*, who, being beyond sea, upon his return exhibited his bill in chancery to be relieved concerning this practice, there being no debt due. And it was resolved, that after a judgment at the common law he could not be relieved there, but was enforced to exhibit his bill in parliament, and there was a special act made for his relief. He also cited another precedent, *Mch. 39 and 40 Eliz.* betwixt sir *Moyle Finch* and *Throgmorton*, an action was brought, and upon special verdict; the question being upon a lease for years by the queen, rendering rent, and for non-payment to be void. In anno 3 *Eliz.* sir *Moyle Finch* purchased the reversion, and entered for non-payment of the rent in 9 *Eliz.* And because it was resolved to be a limitation, and to be the lease void without notice, and that the patentee might avoid this lease, and was adjudged accordingly, and this judgment affirmed in a writ of error; *Throgmorton* afterwards exhibited a bill in chancery, complaining, that at the same time that the default of payment was in 9 *Eliz.* he did send the rent by his servant, who was robbed thereof; which when he knew he paid it immediately the day after, and that the queen accepted thereof; and that he continued the payment until the 30th *Eliz.* when the queen sold it; and that the queen sold it as a reversion, and charged with this lease; therefore it was against conscience that the patentee should avoid it. And to this bill sir *Moyle Finch* pleaded the proceedings at the common law, and demanded judgment, if he might now proceed



in a court of equity. And all the judges of England were hereupon assembled, and these matters debated before them: and resolved by them all, that although the said bill comprehended much matter of equity, and there was very good cause he should have been relieved, if he had complained before the judgment obtained at the common law, yet now, having suffered a judgment at the common law, although it were by way of defect, he comes too late to be relieved in a court of equity; and cannot now examine any pretence of equity after a judgment at the common law. Wherefore he and all the court held here, that the party ought to be bailed; and they let him to bail until the next Term, and he was then discharged. *Ibid.* 22 *Id.* 4. 37.

*It is observable that, in the charges exhibited against the Chief Justice at the Council, 26th July 1616, mention is made of certain high words spoken by him in this cause, respecting the difference between the two Courts.*

*A VINDICATION of the JUDGMENT given by KING JAMES in the CASE of the JURISDICTION of the COURT of CHANCERY, That the LORD CHANCELLOR should not desist to give RELIEF in EQUITY, notwithstanding any PROCEEDINGS at the COMMON LAW, contrary to an OPINION lately published after the supposed AUTHOR'S (LORD COKE'S) DEATH, wherein some ERRORS in the TRANSLATIONS and PRINTINGS of the STATUTES of 27. E. 3. cap. 1. and 4. H. 4. cap. 23. are discovered.*

*Justitiae est velle omnia ut quod aequum est.*

A QUESTION being raised in the court of king's bench, Whether after a judgment given at the common law, the chancery could in any case give relief in equity? or, Whether it were not debarred thereof by the statutes of 27. E. 3. c. 1. and of 4. H. 4. c. 23.? king James, taking notice of that difference (and taking himself to be the judge of the jurisdictions of his courts of justice), did seriously advise thereupon with his learned counsel, upon whose opinions and certificate he did give judgment for the chancery; and accordingly all things were in peace. The chancery court went on in the times of the lord Ebesme, lord St. Albans, lord Coventry, and all others that were lord keepers of the great seal of England ever since as it had formerly done. And the then lord chief justice\* of the king's bench did never question that judgment, although he lived many years after, and was of four parliaments, wherein he had both opportunity and power to have done it, if he had not

\* Lord Chief Justice Coke.

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known that, judgment to have been given according to justice, and the laws of the realm; but he defiled, and did openly profess before the lords of the privy council, that he would not maintain a difference between the two courts, nor bring it into question; whereof entry was made in the council book 26 *Julii* 1616.

NOTWITHSTANDING, the publisher of his third and fourth books of the Institutes\* finding, as it should seem, some old notes collected, when the question was on foot and undecided, hath taken the boldness to print them long after the author's death; and therein hath made him to question all again, by mentioning many cases wherein divers persons had been indicted in *præmunire* upon the statute of 27. E. 3. for seeking relief in chancery after judgments given between the parties at the common law; and concluding with [“ See a privy seal to the contrary, “ 18 *Julii* 1616, obtained by the importunity of the lord “ chancellor †, being vehemently afraid. *Sed judicandum “ est legibus*, and no precedent can prevail against an act “ of parliament. And besides, the supposed precedents “ (which we have seen) are not authentical, being most in “ torn papers, the rest of no credit” ‡]. Thus far he, wherein,

To omit how prejudicial it would be to the whole kingdom if that rule were infallible, that no precedent or prescription, usage or custom (as some have said), § should prevail against an act of parliament, and the distractions it might make in men's inheritances, if other statutes should be so stood upon; and to omit likewise the little respect used to his said majesty's judgment, and the little charity shewed to the lord chancellor, dead long before; that he should be said to have procured that judgment by importunity, *being vehemently afraid*, though 'tis more probable the fear was elsewhere; yet seeing that the authority of such an au-

\* 3. Inst. 123, 124, 125. 4 Inst. † Lord Ellesmere. ‡ 3. Inst. 125. § 4. Inst. 86.

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thor may have given occasion, to some, not only to question but to censure that judgment, as if it were of dangerous consequence, because the judges were not called to it; and that the king's learned counsel, who made that certificate to his said majesty, were great practisers in chancery, and spake for their own ends: that the chancery, when the statute of 4. H. 4. was made, was no court to relieve in point of equity; and the more ordinary the chancery was, the more mischief there was: that there is no need of a chancery; for the judges can, and, in all ages, have judged in equity: and that the chancery is but an *officina*, only to prepare writs for the common law courts to proceed upon, &c. &c.

IN answer to all which it will be requisite to consider, Two points.

FIRST, The office, dignity, and necessity of chancellors and chancery-courts antiently in other commonwealths and kingdoms, and with us.

SECONDLY, The certificate of king James's learned counsel to his said majesty, with the reasons therein expressed.

FIRST, In antient Rome the prætors had power by the law *Prætoria*, to supply and correct laws: *Varro, lib. 5. de Ling. Lat.* And by the law *Cornelia*, they were punished if they did not judge according to equity: *Cicero, Phil. 2.* First point.

IN the Empire it was said to the chancellor, *Fasces tibi judicium parent, & dum jussa prætorianæ sedis portare crederis, ipsam qualemmodo potestatem reverendus assumis.* And, *Persona tua refugium sit oppresso, infirmo defensor, præsidium aliquâ calamitate concluso; sic enim propriè nostros cancellos agicis, si læsorum impia claustra solvatis.* See Spelman's Gloss. page 126. for which he citeth Casiodorus, *lib. 12. formul. 1.* who wrote above 1200 years since.

BESIDES, all kingdoms, commonwealths, principalities, (and subjects also that had *jura regalia*) in all ages have had their chanceries and chancellors. The counties palatine

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latine in England have them to this day: Chester, Lancaster, Durham, &c. The earls of Pembroke, the lords of Glamorgan, and other lords marchers, had their chanceries and chancellors before the statute of Wales, 27. H. 8.

BUT for the antiquity and dignity of the chancery court, and chancellor of England, it is observed, that Wilfinus was chancellor to king Athelstane, (for so he is called in a charter granted to the abbey of Malmesbury); that Turketulus was chancellor to king Edward the elder, and to king Edmund and Edred (*vide* Ingulphus); Adulphus to king Edgar; Alsius abbot of Ely to king Ethelred, who did ordain and grant, that the church of Ely should then and always hold the dignity of chancellor in the king's court (*Histor. Eliens.*): that king Alfred had a court of chancery, 4. Institut. Out of the Mirror, cap. 1. sect. 3. and cap. 5. who saith, that 'twas ordained by king Alfred in parliament, that every man should have a writ remedial out of the king's chancery, which it may be the author of that book (Andrew Horn) meant of, such a course to send for the parties as was then used; for if he meant writs under seals, as they issued out of the chancery in king Edward the second's time, when he wrote, clearly he was mistaken; for there could be no writs under seals in king Alfred's days, neither he nor any of those former Saxon kings using any; for seals came in with the Normans. The Saxon kings' manner was to subscribe their names and crosses to charters. (Ingulphus, Camden, 444. Selden, Titles of Honour, 785.) Some have said that king Edward the Confessor used a seal, and that his chancellor had the custody of it; but that he learned in Normandy, having lived long there before he was king; and then it must necessarily follow, that, the former kings having no seals, there was some other use of a chancellor, and of a court of chancery in those days, if there were a chancery distinct from the king's court; which cannot be shewed:

for

for in those days there were no other courts but the sheriff's court in the counties, and the king's great court *in aula regis*, where the chief justice of England, the chancellor, and the prelates and earls were the judges; whence only those remedial writs issued. I say, then, there must have been some other use of a chancellor and a chancery, than to be an *officina* only to seal writs and commissions for the law courts to proceed upon, when neither seals nor writs were used, nor were there any such courts as now in Westminster-hall. And what other use could there be of that court, or what could there be to denominate them chancellors, but (as 'tis said before of the chancellor under the Emperors), to relieve the distressed, to defend the weak, to be a refuge for the wronged, and to loose the wicked bands wherewith the poor guiltless man was oppressed by the rigor of the laws? which is a lively description of the office of the lord chancellor at this day, and for which cause (saith one \*) a chancery was ordained.

MR. Lambard, speaking of the court of chancery, saith, that whensoever this court of equity did first begin to be a distinct court, the power thereof was always in exercise; and by a comparison of two herbs, which of themselves are poison, but mingled together do make a wholesome medicine, he sheweth the necessity of courts of equity as well as of those of the law: for further proof hereof, it will be requisite that we look higher, how the laws were administered in this kingdom in former times.

It is apparent that in the Saxon times the ordinary courts of justice were kept in the several counties and hundreds, where the seuator or alderman, greve or sheriff, with the bishop or his arch-deacon, were the judges, *quorum alter jura divina, alter humana populum edoceat*. *Vid. Leg. Edgari, cap. 5. & Leg. Canuti, cap. 16, 17.* In some cases the bishop was the sole judge; as in *causa fractionis fidei*, which is a case of breach of promise and of trust, now

relieved in chancery. *Vid. Leg. Alfredi, cap. 1.* In some cases the senator, &c. was sole judge; in some cases both were judges. Of the bishop's power, see *Leg. Edvardi Confessoris, cap. 3. 5. 7.* If any man found himself aggrieved with the judgments in those courts, he might appeal to the king himself. *Leg. Edgari, cap. 28. Nemo in lite regem appellato; nisi quidem domi justitiam consequi aut impetrare non poterit, sin summo jure domi urgeatur ad regem, ut is onus aliquâ ex parte allevet provocato, &c.* which is plain, that the king will relieve him in equity after judgment, which it seemeth was done by his chancellor, who always was a clergyman in the great court in *aulâ regis*.

WILLIAM the Conqueror made an alteration in those courts; for by his charter to Remigius, the last bishop of Dorchester and first of Lincoln, he did ordain, that no bishop or archdeacon should hold any more pleas in the hundred, nor should bring any cause which concerned the government of souls to the judgment of secular men, but that the bishops should judge of such causes themselves in such places as they should appoint; and that no sheriff, greve, or officer of the king's, nor any layman should intermeddle with any laws which did belong to the bishop. *Vid. Selden Not. ad Eadmer. pag. 167, 168,* where many authorities for that charter are cited. Yet afterwards the bishops did continue to sit in the county courts, as appeareth by the laws of H. 1. c. 7. and 31. But it was not long before they did erect their consistories by virtue of that charter of William the first; and then the relief of equity and conscience in the courts of the counties and hundreds ceased, and remained after in the king's highest court in *aulâ regis*; out of which court of *aula regis* the four courts of Westminster, the chancery, king's bench, common pleas, and exchequer, were derived; and the kings have ever since in their courts of chancery justified and relieved their subjects from the rigour and extremity of law.

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law by the rules of equity and conscience, to which the kings of this land are sworn, as well as to do justice according to the laws. See *Leges Edwardi Confessoris*, cap. 17. and king Richard the first's oath, in Hoveden, fo. 374, and Bracton, lib. 3. cap. 9. sect. 6, 2, where he saith, that the king's oath is, to judge in all things according to equity and mercy. And Rastell has the same in French, in his Abridgment of Statutes, printed 1528. The words are, *que il face fair en toutz sez jugemens owel & droit justice ope discreffion & misericordie*. See also Walsingham, page 193. of king Richard the second's oath, whereby it appeareth that the kings of this realm are bound by their oaths to administer justice *with discretion and mercy*; which cannot be done when extremities of forfeitures and breaches of trust may not be examined, and the parties relieved, because of a precedent judgment.

THESE four courts, then included in one court called *aula regis*, did follow the king's court; whercupon they were afterwards called *courts*: but by the great charter granted by king John, and after by king Henry the third, in the third year of his reign\*, which he renewed with some alterations in the ninth year, being the eighteenth year of his age, the common pleas was appointed to be holden in a place certain, and not to follow the king's court; yet the chancellors and judges of the king's bench did long after follow the king's court, as appeareth by the statute *Articuli super Chartas*, 28. E. 1. c. 7.

BUT king Edward the first being weary of the great power of the chief justice of England, and willing to be rid of him, did appoint more to be judges of criminal causes; and then the king's bench began to be a distinct court, and the law to be a profession and a study, and students of the law to be pleaders and judges. Plead-

\* Mr. Selden hath an ancient copy of the charter of 3. R. 3.



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ings, saith sir Edward Coke, 1. Inst. 304. b. came to perfection in Edward the third's time, if that may be called perfection which hath been the cause of many suits, and that many have lost their lands by omitting or mistaking a word in pleading, when otherwise they had good right. For *legis verbosæ lites plurimæ*; and then the 'chancery and exchequer also came to be several courts. General custom, saith the Doctor and Student, is the 'ground of the courts of chancery, king's bench, common pleas, and exchequer: *lib. 1. cap. 7.*

BUT the authority of the chief justice being now divided amongst many, who are equal judges in the king's bench, could not make that court greater than it was before: and the reason alledged, that it should be superior to the chancery, because it hath the style of *coram rege*, whereas the chancery stile is *coram rege in cancellariâ*, and that *additio probat minoritatem*, seemeth trivial; for neither was the style of the king's bench court when it was in the chief justice alone always *coram rege* without addition, but sometimes *coram rege de tempore Hugonis Bygod justitiarum Angliæ*, and sometimes *coram Hugone Bygod justitario Angliæ*, not *coram rege*. 44. H. 3. Notes upon Fortescue, page 5.

NEITHER doth the rule always hold, that *additio probat minoritatem*, unless it be *respectu ejus cujus est additio*. For this addition is not in respect of the king's bench, but in respect of the king's council, after called the star-chamber, because they sat in a chamber so called.

FOR writs issuing out of the chancery, of the same form, and under the same seal, returnable some before the council, and some in chancery, there was a necessity to make a difference in the returns, otherwise no man could have known where to have appeared; and the appearances before the council being *coram rege & concilio*, the other must mention the chancery, in which respect that addition was made, and not in respect of the king's bench; and sometimes the appearances

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appearances in chancery were *coram rege* without addition. *Vid.* Stat. 1. E. 3. c. 9. And by the same rule the king's bench would be above the star-chamber also, because the stile of that court is *coram rege & concilio*, which is an addition.

BUT for a truer mark of superiority, the chancellor is *secundus à rege*: the *teste* of the chancery is *meipso*; whereas the *teste* of the king's bench is *Johanne Brampton milite*.

AND it cannot be denied but that the lord chancellor is above all judges of the laws, both here, in France, and elsewhere. The lord mayor of London is presented to him as to the chief justice of England. He giveth the oath to all the judges. In Stat. 20. E. 3. c. 3. it is ordained by the king, &c. that all justices of *oyer and terminer*, and all justices of assises and gaol delivery, and their associates, shall first make such oath in certain points as to them shall be enjoined by the king's council in chancery before their commissions be delivered to them.

I HOPE it will not be said, but that *precedent and usage* may, and hath prevailed against this act; for there is no such oath now taken, either by the justices of *oyer and terminer*, nor by the justices of assises, nor their associates.

AND farther, the lord chancellor admitteth all the judges into their places, and sitteth above them in their own courts; calleth the chief justices themselves to assist him in chancery; as the lord Coventry did the lord Brampton, where he had no voice, but was an assistant only. And when all the judges are assembled in the exchequer chamber, the lord chancellor sitteth above them, and delivereth his opinion: so did the lord Ellesmere in the case of the *Postnati*. He granteth injunctions to stay the proceedings of that and the other courts. Besides, if the lord chancellor did not grant out writs, the courts of common pleas and king's bench would sit still and have nothing

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to do. And before the statute of *Magna Charta* he used to deny them; nor did he grant any writs then but upon great fines (Doctor and Student, c. 8.); some of which fines had been before that time moderated by king John by his charter 7 Febr. ann. 1. in *Libro Chartarum Archiepiscopi Cant.* And if the Register be the most antient book of the law, (as it is said 4. Institut. 140, out of *Natura Brevium*), it will follow that the chancery is the most antient court; for all those writs were framed and sealed in the chancery, and without such writs those other courts could not proceed. And the Mirror, cap. 1. sect. 3. saith, that cases were judged according to equity, before the customs of the realm were written and made certain.

By all which it followeth, that the chancery is the superior court.

NOR let it be said, that there is no need of a chancery, because that the judges can, and in all ages have judged in equity: for although no man did ever doubt of their abilities, yet that they ever did judge in equity (otherwise than as by commission, when they sit in chancery), or that there is any remedy at law by a writ of error after judgment for equity, is more than can be shewed; certainly such a writ was never sealed in the chancery: but that saying sheweth, that there is need of a chancery, and of equity after judgments at law; and then the question will be, not of the thing, but who shall be the judges of it. And that certainly is fittest to go as it was wont (as Jupiter said of the weather), and not now to be transferred to a new judicature.

AND if the judges should be made chancellors, how would they execute that power? Can they examine any man upon oath, whether he hath received all, or part of his money upon a bond or mortgage? or whether he hath broken a trust? And will they examine witnesses *viva voce*, or grant commissions into the country? And how shall those  
be

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be published ?<sup>a</sup> And if they should do all this, were not this to erect a court of chancery in themselves, and to confound the courts of equity and law together ? It might better be said that there is no need of trials by juries ; for trials for criminal causes were by *Ordeal* till H. 3. And then because a general Council<sup>b</sup> had taken away that kind of trial, the king wrote to the justices itinerant to punish some, leaving it to their discretions how to proceed against such other offenders. And certainly the lord chancellor and that court are as able to judge a cause upon hearing of witnesses, as twelve country jurors. No other countries have any such trials ; but there is no country but hath chancellors and courts of equity to mitigate the rigour of their laws, which rigour cannot appear till judgment be passed ; for before the case be adjudged, who can know whether the law be rigorous or no ? If therefore, after judgment, there shall be no remedy, then the rigour of the law cannot be mitigated, which were not *suum cuique tribuere*, but rather *discedere ab aequitate sequendo subtilitates*.

AND as to the objection, that by this statute providing against a superior court, viz. the parliament, all inferiours are comprehended, to which end the archbishop of Canterbury's case<sup>†</sup> upon the statute of 13. Eliz. c. was alledged ; and as to the other, that it is an absurdity to say, that the king is within this statute, and the parliament, and not the chancery ; it may be answered, that it is no general rule, that because an act is made against a superior, it should therefore bind all inferiours ; for the statute of 1. Eliz. that no archbishop or bishop should alien to any subject, did not extend to prebends, parsons, &c. though they were inferior and subordinate to the other. But the case of the archbishop of Canterbury was *à converse*, that the superior was not bound by an act made against an inferior, as may appear by the acts of 31. H. 8. c. 13. El. c. and of Westm. 2. therein mentioned.

<sup>a</sup> Lateranense Anno 1215, cap. 18. <sup>†</sup> 2. Coke, 46. Moor, 410. 534.

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NEITHER is there any absurdity at all; for if the king, assenting to that act, had meant to abridge the chancery, it is probable the chancery would have been named in it; but the king, intending that that act should only extend to pleas of the crown, by the words *plee roial*, there was no necessity of naming the chancery, that meddled with no such pleas; and in other pleas, neither the king nor parliament are bound by this statute, as may appear by the continual practice ever since.

AND where it is said, that the more ordinary the chancery is, the more mischief there is; so it is said, the more physicians the more diseases; yet the diseases are not in the physicians, nor the mischiefs in the chancery: they are in the multiplying of wickedness, and that men seek to take advantages by extremities of law, which the chancery doth remove or mitigate by the rules of equity.

OF the necessity of the court of chancery, see more hereafter, where the inconveniences, if it should not relieve after judgments, are mentioned.

Second point.

SECONDLY, concerning the certificate, and the persons and qualities of the referees; they are all known to be of great worth and learning, great practisers in the law courts as well as in chancery, and very shortly after were advanced to the chiefest places in both: they were all then of his majesty's learned counsel (and one\* of his privy council), sworn to give the king true and faithful counsel, when they should be required; and in this case they were required, and had time to deliberate, and they did return their opinions to his majesty under all their hands, which do remain. And can any man think that they, being men of such note, would in such a case as concerned the jurisdiction and proceedings in this high court of chancery, (whereof his majesty himself was to give judgment) respect their practice in chancery, and their own ends, before their reputations, allegiance, and oaths to his majesty? For they were as much sworn to give their opi-

\* Sir Francis Bacon.

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nions, in this case, truly and faithfully, as the judges are, when they deliver their opinions in parliament, or when they go their circuits, or sit in chancery.

NEITHER was the consequence so dangerous in that the judges were not called to it, for it was a question of jurisdiction of courts; and if judges should judge of jurisdictions, they might bring all under themselves; therefore neither the judges, nor the lord chancellor, nor any of the chancery were advised with; for they might be taken to be parties; but the king did advise with his learned counsel, who were indifferent, and sworn to give him faithful counsel, as is said. And he was a judicious king, and knew best with whom it was fittest for him to advise.

As concerning the certificate, it will not be amiss to set down the substance of the whole proceedings therein, and the reasons and principles of law which the said referees expressed and delivered to his said majesty, as they are recorded.

HIS said majesty being informed of this difference between his two courts of chancery and king's bench; and being informed that there were many precedents in the chancery in the times of king Henry VII. and continually since, whereof a note was delivered to his said majesty, that such as complained there were relieved in equity after judgments at common law, in cases where the judges could not relieve them; directed, that his attorney-general, calling to him the rest of his learned counsel, should peruse the said precedents, and certify his majesty the truth thereof with their opinions.

WHFREUPON they returned to his majesty this answer as followeth:

ACCORDING to your majesty's commandment, we have advisedly considered of the note delivered unto us of the precedents of complainings and proceedings in chancery after judgments at common law; and have also seen and perused the originals, out of which the same note was ab-

The certificate  
of the king's  
counsel.

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tracted; upon all which we do find and observe the points following:

WE find the same note is fully verified and maintained by the originals.

WE find, that there hath been a strong current of practice of proceeding in chancery after judgment, and many times after execution, continued from the beginning of king Henry the VIIth's reign unto the time of the lord chancellor that now is, both in the reigns *separatim* of the several kings, and in the times of the several chancellors, whereof divers were great learned men in the law; it being in cases where there is no remedy for the subject by the strict course of the common law, unto which the judges are sworn.

WE find, that the proceeding in chancery hath been after judgment in actions of several natures, as well real as personal.

WE find it hath been after judgment in your majesty's several courts, the king's bench, common pleas, justices in eyre.

WE find it hath been after judgment obtained upon verdict, demurrers, and where writs of error have been brought.

WE find, in many of the cases, that the said judgments are expressly mentioned in the bills in the chancery themselves to have been given, and relief prayed thereupon, sometimes for stay of execution, sometimes after execution, of which kind we find a great number in king Henry the VIIth's time.

WE find the matter in equity laid in such bills, in most of the cases, to have been matter precedent before the said judgment, and not matter of agreement after.

WE find in the cases not only the bill preferred, but motions, orders, and injunctions, and decrees thereupon for discharging and releasing of the judgments, or avoiding the

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the possession thereupon obtained; and sometimes for the mean profits, and the release of the costs, &c.

WE find in some of the cases, that this very point, that judgment hath been given, hath been stood upon by the defendants, and alledged by them by way of demurrer, and overruled.

WE find, that the judges themselves in their own courts, when there appeared unto them matters of equity, because they, by their oath and office, could not stay the judgment (except it were some small time), have directed the parties to seek relief in chancery.

WE find, that it hath not only been done in the times of the several chancellors, but by the judges themselves; and that without difficulty, while they sat in chancery, in the vacancy or absence of the chancellor.

WE find the hands of sundry principal counsellors at law, whereof divers of them are not judges, and some of them are now in chief place, to bill in this kind.

LASTLY, there were offered to be shewed unto us many other precedents, whereof we heard some read, and found them to be of like nature with those contained in the note.

AND afterwards a case was presented to his majesty as followeth :

*A.* hath a judgment and execution in the king's bench or common pleas against *B.* in an action of debt of 1000 *l.* and in an *ejectione firmæ* of the manor of *D.* *B.* complains in the chancery to be relieved against these judgments according to equity and conscience, allowing the judgment to be lawful and good by the rigour and strict rules of the common law, and the matter in equity to be such as the judges of the common law, being no judges of equity, but bound by their oaths to do the law, cannot give any remedy

A case put.



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medy or relief for the same, either by error or attain, or by any other means.

Question there-  
on.

WHETHER the chancery may relieve *B.* in this or such like cases, or else leave him utterly remediless and undone? And if the chancery be restrained herein by any statute of *præmunire*, then by what statute, and by what words in any statute, is the chancery so restrained, and conscience and equity excluded, banished, and damned?

WHICH case his majesty referred again to his said attorney and learned counsel, calling to them the prince's attorney, who returned this answer.

Answer thereto.

ACCORDING to your majesty's commandment, we have deliberately advised of the case sent unto us by the lord chancellor, and of the statutes, as well those of *præmunire* as others, as far as (we take it) may concern the case. And for our better information herein, we have thought fit to send for and peruse the original records themselves, remaining in the Tower of London, of those statutes not only appearing upon the rolls, but also upon the original roll of petitions in parliament, with the king's answers, which is the warrant to the rolls of parliament. We have taken into consideration as well book law, as divers other acts of parliament which may give light unto the statute whereupon the question properly grows, together with such ancient records and precedents as we could find, as well those which maintain the authority of the chancery, as those which seem to impeach the same. And upon the whole matter we are all of opinion, that the chancery may give relief in the case in question; and that no statute of *præmunire* or other statute restraineth the same.

AND because we know not what use your majesty will be pleased to make of this our opinion, either for the time present or future, we are willing to shew some reasons of the same, not thinking fit to trouble your majesty with all those

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those things whereupon we have grounded ourselves, but selecting out some principal things which moved us to be of this our opinion, to the end the same may be a fuller object of your majesty's princely judgment, whereunto we always submit ourselves.

AND first of all, we must lay for a sure foundation that which was contained in our former certificate concerning the continual practice by the space of six score years, in the times of king Henry VII. king Henry VIII. king Edward VI. queen Mary, and queen Elizabeth, of this authority; and that not only in those times when the authority was managed by the bishops, which might be thought less skilful or less affectionate towards the laws of the land, but also by divers great lawyers, which could not but both know and honour the laws as the means of their advancement; sir Thomas More, the lord Audely, the lord Rich, sir Nicholas Bacon, sir Thomas Bromley, sir John Puckering.

AND further, that most of the late judges of the kingdom, either as judges when they sat in chancery by commission, or as counsellors at law when they did set their hands to bills, have by their judgment and counsel upheld the same authority. And therefore forasmuch as it is a true ground, that *optimus legum interpret est consuetudo*, especially when the practice or custom passeth not among vulgar persons, but among the most high and scient magistrates of the kingdom; and when also the practising of the same should lie under so heavy pain as *præmunire*, this is unto us a principle and most implicit satisfaction, that those statutes ought not to be construed to extend to this case. And this of itself we know is of far more force to move your majesty than any opinion of ours, because kings are fittest to inform kings, chancellors to teach chancellors, and judges to teach judges,

BUT of our science and profession, we have thought fit to add these farther reasons and proofs very briefly, because

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in so ancient a possession of jurisdiction we hold it not fit to amplify.

THE statutes upon which this question grows are principally two, whereof one is the statute of *præmunire*, and the other is a statute of simple prohibition. That of *præmunire* is that of 27. E. 3. c. 1. The statute of simple prohibition is the statute of 4. H. 4. c. 23. There be divers other statutes of both kinds, but the question will rest principally upon these two, as we conceive.

FOR the statute of 27. E. 3. it cannot in our opinions extend unto the chancery, for these reasons:

1. FIRST, out of the mischief which the statute provides for and recites, *viz.* that such suits and pleas against which the statute is provided, were in prejudice and disinherison of the king and his crown, which cannot be applied to the chancery; for the king cannot be disinherited of jurisdiction, but either by the foreigner or by the subject, but never by his own court.
2. OUT of the remedy which the statute appoints, *viz.* that the offender shall be warned within two months to be before the king and his council, or in chancery, or before the king's justices of the one bench or the other, &c. by which words it is opposite in itself, that the chancery shall give both the offence and the remedy.
3. OUT of the penalty, which is not only severe, but hostile, namely, the offender shall be put out of the king's protection; which penalty altogether favours of adhering to foreign jurisdiction, and would never have been inflicted upon an excels only of jurisdiction in any of the king's courts, as the court of chancery.
4. OUT of the statutes precedent and subsequent, as 25. E. 3. c. 1. and 16. R. 2. c. 5. which are of the same nature, and cannot be applied but to foreign courts; for the word *alibi*, or elsewhere, is never used but where Rome is named, especially before the disjunctive in this statute, which

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which only gives the colour, *viz.* that they which draw any out of the realm in plea whereof the cognizance pertaineth to the king's court, or of things whereof judgments be given in the king's court, or which do sue in any other court, to impeach the judgments given in the king's court; this last disjunctive, we say, which must go farther than courts out of the realm, which are fully provided for by the former branch, hath sufficient matter to work upon in respect of such courts, which, though they were locally within the realm, yet in jurisdiction were subordinate to the foreign; such as were the legates court, the delegates court, and in general all the ecclesiastical courts at that time, as it is expressly construed by the judges in 5. E. 4. folio 6.

In this, the sight of the record of the petition doth clear the doubt, where the subjects do supplicate to the king to ordain a remedy against those which pursue in other courts than in his own, against judgments given in his court; which explains the word *other* to be, other than the king's court.

WITH this agrees notably the Book of Entries, which translates the words *in other court*, not in *aliâ cur' sed in alienâ curiâ*.

THE statute of 27. E. 3. being in corroboration of the common law, as itself recites, we do not find in the Register any precedent of the writ *ad cur' regis*, which are framed upon these cases, that were afterwards made penal by *præmunire*, but only against the ecclesiastical courts.

LASTLY, we have not found any precedent at all of any conviction upon the statutes of *præmunire* of this nature for suits in chancery, but only two or three bills of indictment preferred; *sed nihil inde venit*, for aught appears to us.

To which reasons there is no answer at all given in those Institutes, nor notice taken of them, but of the privy seal

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seal for the inrollment of king James's judgment grounded upon them, which appears to be twenty-eight years before the publishing of those books; so long did that judgment rest in peace; only against the last reason there is mention made of some indictments preferred upon this statute, *viz.* against Heydon, Lloyd, Dewse, Heale, but they do rather confirm than refute that reason; for it is not said *quid inde venit*. There is no precedent alledged of any conviction upon those indictments; and a man that is indicted is not therefore guilty. And as to the other against sir Anthony Mildmay, who in the said Institutes\* is said to have purchased and pleaded his pardon, that doth not prove him guilty neither; for any man that hath a coronation or parliament pardon will rather plead it than be troubled with a wrangling adversary; or will purchase a pardon, rather than run so great a danger as the penalty of a *præmunire* upon the verdict of twelve men, when he is doubtful that the judge's opinion may be against him, and that he would declare the law to be so.

AND farther, it is observable, that this statute is not fully recited in those Institutes, for it ends at those words *cient jour*; so the clause of the remedy which is to be given by the chancery, which followeth, and is mentioned in the second reason, is not recited; although the remedy which is to be given by the judges, is recited afterwards in the same chapter.

NEITHER are the words *en autri court* well translated; for they do not signify, as it is there, "in any other court," where the word *any* is added more than is in the original, but "in the court of another," *in alterius curiâ*; for *autri* cannot agree with court, they differ both in case and gender. The same word is used in the laws of William the first, c. 14. *Ki. alteri espouse purgift; qui sponsam alterius vitiauerit* [not *aliam*]. And cap. 33. *Li naifs qui*

\* 3 Inst. 125.

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*despartes de sa terre dunt il est nez event a autri terre, nuls nel retenget, &c. Nativus qui discedit a terra ubi natus est, & venit ad terram ALTERIUS, nullus eum retineat.* And again in the same chapter in the same sense. And 14. E. 3. c. 2. *Presentments que nous ferrent devolutz en autri droit.* And 25. E. 3. c. 1. bis, and c. 2. *Que le roy ne prendroit title a presenter a nully benefice en autri droit, &c.* that the king will not take title to present in the right of another man, &c. and in many other places; but it is always understood of "another," not "any other," as is there translated: and then the sense must be, *That whosoever shall sue in another man's court than the king's, shall, &c.* which no doubt was the intent of this statute, as is touched in the fifth and sixth reasons; to which there is no answer given.

And so the chancery (being the king's court and not the court of another) cannot be within this statute, no more than the king's bench. For judgments given in the common pleas are examined and reversed by writ of error in the king's bench; but neither writs of error nor attainits being excepted out of this statute, the king's bench should fall within it, as well as the chancery, or any other of the king's courts.

AND if it be said that the former judgment was no legal judgment, because it is reversed upon matter appearing upon the record, and so ought not to have been judged at all; yet it was a judgment given in the king's court, and, by the construction of this statute, it ought not to be questioned or overthrown in any other court. The consideration thereof made those to look about them, when they saw themselves not unlike to fall into the pit which they went about to dig for others, whereof they shewed more fear than the chancellor did, as appears by the coming off.

So the chancery and all other courts within the realm (except such as were subordinate to the court of Rome, which were the courts of another, not of the king) being cleared from this statute, the other statute of 4. H. 4. c. 22,

doth

*Premunire* had  
now no place,  
seeing there is  
no pleading  
*alibi quam in*  
*cur regis.*  
Smith's Com-  
monwealth, 22  
3. c. 11.

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doth follow to be considered; and therein it will not be impertinent,

1. **FIRST,** To recite a former petition of the commons in the same parliament, to which part of the king's answer to this petition doth relate, and likewise the statute itself.

2. **SECONDLY,** The reasons given to king James by the said referees of their opinions upon this statute, and his said majesty's judgment upon both statutes.

3. **THIRDLY,** Some farther observations upon this statute, upon which the said referees might ground their opinions, though they did, as they say, forbear to express them.

THE petition and the statutes, as they are upon the parliament rolls, and as the statute is in print, both in the French and English, are as followeth :

ROT' PARLIAMENTI DE ANNO REGIS HENRICI QUARTI  
QUARTO.

Suggestion 78.

*ITEM prient les communes que come en les estatutes faitz a Westminster l'an de regne le roy nuel nostre seigneur le roy que ore est l'an de son regne xxx. entre autres estoit ordeigne que nully delors soit pris per petition ou suggestion fait a notre seigneur le roy ou son conseil si ceo ne soit per enditement des loialx gents de la vigne ou tiel faet si fist en due manere ou process fait per brieve original ne oust de son franktenement sil ne soit mesme ducment en response & forjuage dicel per force de ley. Et outre ceo en l'estatutz faitz a Westminster l'an de regne mesme le roy Edward xiii est essentu & accorde pur bone governance de la commune que nul hom: soit mis a respondre sans presentment devant justices ou chose de record ou per deve processe et brieve original solum ancient ley de la terre et si rien desore enavant soit fait l'encontre soit void en ley & tenuz pur null mes pur error et non obstant quel estatut puis encea plors de vous liegezount este grevez per diverses briefes & lettres ascuns per simples suggestions sans autres chose trouve  
issauntz*

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issuantz hors de la chancellary sur certain peine comprise en y ceux de comperer devant voz en votre chancellarie ou conseil ascuns per briefs issantz hors de votre exchequer quia datum est nobis intelligi et ascuns per lettres south votre prive seale de comperer devant votre conseil & tres grant arrerisment de vos liegez et encontre voz leyes et estatutz avantditz: que pleise d'ordeigner que les estatutz avantditz de ceo en avant soient pleinement gardes et outre d'ordeigner que briefs & lettres avantditz soient de tout onster & que nul liege del roy soit arte de comperer ou respondre per nul tiel brief ou lettres ne mis a perde de lour biens ou chateux & celui que face tiel suggestion en temps avenir sur nully de voz liegez soit ceo a voz mesmes votre conseil chancellor ou tresorer ou devant voz barons de la exchequer que celui que face tiel suggestion trouve bone et sufficient seurty d'averer sa suggestion a fin que si celui que ensi est accusez de son bone grec vient en le lieu ou l'avantdit suggestion est et traverse l'avantdit suggestion soit son traverse rescu sans delay et si soit trouve encontre celui que ensi fist tiel suggestion et pur celui que ensi est accusez que celui que ensi est accusez recouvrer ses damages vers l'accusour a taxer per mesme l'enqueste per quel il est ensi acquite eiant regard a sa disclaundre costages et labors pur sa defence et outre face fyn et ransom a roy et son corps pris a demorer pur un an en prison pur la fausisme avantdit et que ceste ordinance extende sibien a temps passe come a temps avenir de tieux suggestions pendantz nient uncore discussiez.

- **LE ROY VOËT** chargier ses officers de leur plus abstenir Resp.  
d'envoyer pur ascuns ses lieges quils nont fait devant ses heures mais n'est pas l'intencion mesme nostre seigneur le roy que mesmes ses officers tant se abstinerent quils ne purront envoyer pur ses lieges en matieres & causes necessaires come il ad este fait en temps des bons progenitours mesme nostre seigneur le roy.



# ON THE JURISDICTION OF THE

## THE SAME IN ENGLISH.

Suggestion 78.

**ITEM** the commons do pray, that whereas in the statutes made at Westminster in the year of the reign of king Edward, grandfather to our lord the king that now is, in the twenty-fifth year of his reign, amongst other things it was ordained, that no man should thereafter be imprisoned upon petition or suggestion made to our lord the king, or his counsel, but by indictment by lawful men of the viſſage where the fact was done in due manner, or by process made by original writ; nor be put out of his freehold, unless he were duly brought to answer and judged out of the same by the law. And farther, in the statutes made at Westminster, in the forty-second year of the reign of the said king Edward, it was assented and accorded, for the good government of the commons, that no man should be put to answer without presenting before justices, or matter of record, or by due process, and writ original, according to the ancient law of the land; and if any thing hereafter should be done to the contrary it should be void in law, and holden for null and error; and notwithstanding the said statute, many of your subjects have since that time been grieved; some upon bare suggestions without proof by divers writs and letters issuing out of the chancery upon a certain pain therein mentioned to appear before you in your chancery or council; some by writs out of the exchequer, *quia datum est nobis intelligi*; and some by letters under your privy seal, to appear before your council, to the great hindrance of your subjects, and against your laws and statutes aforesaid: that it may please you to ordain, that the said statutes may from henceforth be fully kept; and farther, that the writs and letters aforesaid may be altogether taken away, and that none of the king's subjects may be compelled to appear or answer by any such writ or letters, nor made to lose their goods or chattels; and that he that shall make such suggestion against any of your subjects hereafter, whether it be to yourself, your council, chancellor,

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or treasurer, or before your barons of the exchequer, that he that makes such suggestion may find good and sufficient surety to prove his suggestion, to the end that he that is so accused may freely come to the place where the suggestion is made, and traverse the said suggestion; and that his traverse may be received without delay: and if he be found against him that so made the suggestion, and for him that is so accused, then he that is so accused may recover his damages against the accuser, to be taxed by the said inquest by which he is acquitted, having regard to the slander, costs and labour in his defence; and farther may make fine and ransom to the king, and be imprisoned for a year for the falsehood aforesaid; and that this ordinance may extend as well to the time passed as to come, for such suggestions as hang undecided.

THE king will charge his officers to be more sparing to send for his subjects than they have been heretofore. But it is not the intention of our said lord the king, that his said officers shall so far refrain, that they may not send for his subjects in matters and causes necessary, as hath been done in the times of the good progenitors of our said lord the king.

Answer.

## ROT' PARLIAMENTI DE ANNO QUARTO REGIS HENRICI QUARTI.

*ITEM prient le communes que come s'bien en plee roial come personal apres judgments renduz en les courts nostre seigneur le roy les parties sont faits venir sur grief peine a la foith devant le roy mesme a la foith en conseil Et q la foith en parliament de ent respondre de novel agrand amentissement de parties avantditz Et que plus est en subversion de la commune ley del terre plesca nostre tresexcelent Et tregracious seigneur le roy de ent ordeigner remedy issint que apres judgment rendu en toutz courts nostre seigneur le roy les parties Et lour heirs ent soient en pees tam le judgment soit anientz per atteint ou per error si error y ad come il ad este per la ley usee en temps de*

Plea royal  
personal.

vozz

## ON THE JURISDICTION OF THE

*vouz tresnoble progenitours roys d'Engleterre & en mesme la manere come affiert soit chescun matire que pourra estre terminee par la commune ley & que due peine soit ordeynee en cest present parlement envers ceux que persueut le contrery et ceo pur Dieu & en le saluation de toutz estates de roialme.*

**Resp.**

*TOUCHANT le primer article de cest petition quant al judgments renduz en coert le roy LE ROY LE VOET et quant al remnant de mesme le petition il est responduz peramont entre les communes petitions.*

## THE SAME IN ENGLISH.

*ITEM,* The commons do pray, that whereas as well in plea royal as personal, after judgments given in the courts of our lord the king, the parties are made to come upon great pain, sometimes before the king himself, sometimes in council, sometimes in parliament, to answer thereof anew, to the great undoing of the parties aforesaid, and, which is more, in subversion of the common law of the land: that it may please our most excellent and most gracious lord the king thereof to ordain remedy, so as after judgments given in all courts of our lord the king, the parties and their heirs may be thereof in peace until the judgment be undone by attainr or by error, if there be error, as hath been by the law in use in the times of your noble progenitors kings of England; and in the same manner as it is meet that every matter may be (that can be) determined by the law; and that due pain may be ordained in this present parliament against those that do pursue the contrary; and that for God his sake and in salvation of all the estates of the realm.

**Answer.**

*TOUCHING* the first article of this petition, as to judgments given in the king's court, *LE ROY LE VOET*: and as to the remnant of the said petition, it is answered above, amongst the commons petitions.

**STATUTUM**

# COURT OF CHANCERY.

## STATUTUM DE ANNO QUARTO HENRICI QUARTI, CAP. 22.

As it is in the printed Statutes in French.

*ITEM, Come sibien en ple roial come personel apres judgments renduz en les courts nostre seigneur le roy les parties sont faitz venir sur grevouise peine a le foitz devant le roy mesmes, & a la foitz devant le conseil du roy, & a le foitz en parlement dent rendre de novel a grand anientissement des parties suis ditz & en la subversion del commune ley del terre ordeines est & establies que apres judgments rendus en les courts le roy les parties & leur heirs ent soient en pees tanque al judgement soit anientes per atteint ou per erreur si errour y ad come il ad este uses per la ley en temps des progenitours nostre dit seigneur le roy.*

### THE STATUTE IN ENGLISH IS PRINTED THUS:

*ITEM,* Where as well in plea real as in plea personal, after judgment given in the court of our sovereign lord the king, the parties be made to come upon grievous pain, sometimes before the king himself, sometimes before the king's council, and sometimes in the parliament, to answer thereof of new, to the great impoverishing of the parties aforesaid, and in the subversion of the common law of the land. It is ordained and established, that after judgments given in the courts of our sovereign lord the king, that parties and their heirs shall be thereof in peace till the judgment be undone by attainr or by error (if there be error), as hath been used by the laws in the time of the progenitors of our aforesaid lord the king. Cap. 22.

THIS statute (as hath been observed) is but thrice mentioned in all the law books, once in Doctor and Student,

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and twice in those Institutes. And if the supposed author did intend in those Institutes to make a question, he did then not keep his word given to the lords of the council, which was, "that he would not draw it into question, nor maintain any difference between the courts," as it is entered in the council-book before-mentioned. And if the publisher of those books hath done it contrary to his intention, he hath not done well to publish such opinions to make a difference without the author's intention: but howsoever it doth appear, that those books of Institutes were printed but in the year 1644, which was 241 years after the making of this statute; and it is strange that in all that time there should be no occasion given, nor opinion delivered, that the chancery should be within that statute; but now to be found out so long after. For *Seint-German*, in his book intituled Doctor and Student, though he saith, that by this statute judgments given in the king's courts shall not be examined in chancery, parliament or elsewhere, and that it is a good law (wherein notwithstanding he doth mistake), for the "chancery" is not named in that statute, nor the word "elsewhere;" yet he saith farther, that many mischiefs may happen thereby: for that statute was made, saith he, to eschew the inconveniences that otherwise plaintiffs (though upon never so good grounds) should seldom come to the effect of their suits; but that it prohibiteth not equity, but only the execution of the judgment, *lib. 1. cap. 18*. Besides, that book giveth a general rule, that where any thing is excepted from the general customs and maxims of the law by the law of reason, remedy is given in chancery by *subpœna*, and an injunction is obtained to stop proceedings at law, *lib. 1. cap. 17*. And in case of a bond (he saith plainly), if the money be paid and there be no acquittance, the law is not that it should be paid again; for that law were against reason and conscience; the party hath his remedy by *subpœna*; and so in many other

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other cases where conscience serveth for him, *cap.* 12.; which is as much as the chancery doth or ever did desire.

AND so, there is no authority in all the books of the law against this practice in chancery, and the only book that mentioneth this statute is for the chancery.

SECONDLY, The referees do certify his said majesty, that this statute was made against proceedings within the realm, and not against foreign, and therefore hath no penalty annexed; nevertheless, they say, We conceive it extends not to the chancery in the case delivered for these reasons:

FIRST, The statute recites where the parties are made to come upon grievous pains, sometimes before the king himself, sometimes before his council, and sometimes in parliament, to answer thereof anew, &c. where it appeareth that the chancery is not named, which could not have been forgotten, but was left out upon great reason, because the chancery is a court of ordinary justice, for matter of equity, and the statute meant only to restrain extraordinary commissions and such like.

SECONDLY, This appeareth fully by view and comparing the two petitions which were made the same parliament of 4. H. 4. placed immediately one after the other; the first which was rejected by the king, and the second whereupon this statute was made; the first being to restrain three ordinary proceedings of justice, *viz.* in the chancery by name, in the exchequer, and before the king's council by process of privy seal, unto which the king makes a royal and prudent answer in these words: "The king will charge his officers to be more sparing to send for his subjects by such process than they have been heretofore; notwithstanding it is not his mind, that his officers shall so far be restrained, but that they may call his subjects before them in causes necessary, as it hath been done in the times of his good progenitors." And then immediately follows the

E 2 petition

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petition (whereupon the act now in question was made), unto which the king gave his assent, and wherein no mention is made at all of the chancery or exchequer.

THIRDLY, If the chancery should be understood to be within this statute, yet this statute extends not to this case; for the words are, that the king's subjects, after judgments, are drawn to answer thereof anew; which must be understood, when the same matter formerly judged is put in issue or question again: but where the cause is called into chancery only upon point of equity, there, as the point in equity was never in question in the common law courts, so the point of law, or fact that concerns the law, is never in question in the chancery; and so the same thing is not twice in question, or answered anew, for the chancery doth supply the law, and not cross it.

FOURTHLY, It appeareth to our understandings by the case of error and attain in the said statute, what jurisdiction it was that the statute meant to restrain, viz. such jurisdiction as did assume to reverse and undo the judgment, as error and attain doth; which the chancery never doth, but leaves the judgment in peace, and only meddleth with the corrupt conscience of the party; for if the chancery doth assume and reverse the judgment in the point adjudged, it is void, as appears by 39. E. 3. c. 14.

FIFTHLY, We find no precedents of any proceedings to conviction or judgment upon any indictment framed or grounded upon this statute, no more than upon the statute of *præmunire*; and the late indictments are *contra diversa statuta*, not mentioning the particular statutes.

LASTLY, It were a great mischief to force the subject in all cases to seek remedy in equity, before he knew whether the law will help him or no; which oftentimes he cannot do till after judgment; and therefore he is to seek his salve properly, when he hath his hurt.

THERE be divers other things of weight, which we have seen and considered of, whereupon we have grounded our opinion, but we go no farther than that we have seen.

BUT

COURT OF CHANCERY.

BUT because matter of precedent is greatly considerable in this case, and that we have been attended by the clerks of the chancery with the precedents of that court, and have not been attended by any officers of the king's bench with any precedents of indictments—if it shall please your majesty to direct that the said officers shall attend us with their precedents, we shall give your majesty faithful report of them as we have done of this other. All which, &c.

*Fran. Bacon, Hen. Yelverton,  
Hen. Montagu, Randl. Crew,  
John Walter.*

UPON which certificate the king gave his judgment as followeth:

FORASMUCH as mercy and justice be the true supporters of our royal throne, and that it properly belongeth unto us in our princely office to take care and provide, that our subjects have equal and indifferent justice ministered unto them; and that where their case deserveth to be relieved in course of equity by suit in our court of chancery, they should not be abandoned and exposed to perish under the rigour and extremity of our laws: We in our princely judgment having well weighed, and with mature deliberation considered of the several reports of our learned counsel, and all the parts of them, do approve, ratify and confirm, as well the practice of our court of chancery expressed in their first certificate, as the opinions for the law upon the statute mentioned in their later certificate, the same having relation unto the case sent unto them by our chancellor. And do will and command that our chancellor, or keeper of the great seal for the time being, shall not hereafter desist to give unto our subjects upon their several complaints now or hereafter to be made, such relief in equity

The king's  
judgment.



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(notwithstanding any proceedings at the common law against them) as shall stand with the merit and justice of their cause, and with the former antient and continued practice and presidency of our chancery. And for that it appertaineth to our princely office only, to judge over all judges, and to discern and determine such differences as at any time may and shall arise between our several courts touching their jurisdictions, and the same to settle and determine, as we in our princely wisdom shall find to stand most with our honour, and the example of our royal progenitors in the best times, and the general weals and good of our people, for which we are to answer unto God who hath placed us over them: Our will and pleasure is, that our whole proceedings therein, by the decrees formerly set down, be inrolled in chancery, there to remain of record, for the better extinguishing of the like differences and questions that may arise in future times.

*Per ipsum Regem, 18 July 14, 1616.*

Fran. Bacon, Hen. Yelverton.

ALL which proceedings are inrolled in chancery.

IN farther vindication of which judgment of his said majesty, and to shew that the chancery is not within the statute, I desire that these four things may be taken into consideration:

FIRST, What the forms were of making of laws in those times, and how they do now differ.

SECONDLY, The words of this statute.

THIRDLY, What the mischiefs and grievances were that occasioned this statute.

FOURTHLY, What the practice hath been ever since.

FIRST,

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**FIRST,** Concerning the forms of making of laws in those times, it appeareth upon the rolls that most of the laws were then preferred to the king by way of petitions, and that the lords, at the first sitting down of their house, did appoint receivers and tryers of petitions; a form yet used, and was done this very parliament, but that it is now *pro formâ* only, as there is no use of them; but in those times after the petitions were received and had passed both houses, they were ingrossed by the clerk into one roll, and so presented to the king. And after the end of the parliament, all those acts which the king had assented unto, and were to be published as statutes, were extracted into another roll, and transcripts made of them under the great seal of England, and sent to every sheriff to be proclaimed in their several counties, printing being not then invented. But sometimes there was not so much care taken as ought to have been in making of that second roll, whereby many acts are delivered to us imperfect, whereof some examples are mentioned 4. Institut. To which this act now in question might have been added, but that use had been made of it against the chancery, it seeming to be neither faithfully transcribed, nor faithfully translated, and is but abridged, and seven whole lines together omitted, and yet it is printed among the statutes at large. All which may appear by comparing the print with the roll of petitions in that parliament, copies of both which are prefixed.

AND where it was said, that there hath been no control for these 200 years; that this statute was mis-printed; and that the learned men of that time knew best how to print the statute; it is answered, that there was no such use made as now, nor cause given to look into it; for it rested 200 years without any such exposition as now is given to it; which late exposition is the occasion that now it is looked into, examined, and (as is observed) ought to be rectified: and printing was not then invented; the learnedst man of that age knew not what printing was.

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BUT those forms of passing bills in parliament have been since altered, which began in king Henry VII.'s time, when petitions were so many and of such length that they could not well be comprehended in one roll; then every petition was changed into the form of an act, and made in English, which before were in French or in Latin, and presented by itself; and if the king did not assent unto it, it was laid aside and not entered upon the statute roll: and since printing came up, there hath been no use of any such second roll to collect the acts to which the king had assented, nor of making any such transcripts for the sheriff to publish them, the print supplying that turn. But formerly all the petitions remained upon the parliament roll, whether the king had assented unto them or no, as is apparent by the roll of this parliament of 4. H. 4. now in question; by which it also appeareth that before this petition there was another petition of the commons, wherein they complained, that by writs issuing out of the chancery under a pain, and out of the exchequer, and letters from the king's council, the subjects were made to lose their goods and chattels upon suggestions; which petition is *numero* 78. *tit.* Suggestion; to which the king did not assent (a copy of which petition is likewise prefixed). And after upon the same roll, *numero* 110. doth follow this petition now in question, *titulo Plce Roial & Personel*; to which the king doth assent in part; and as to the rest he saith, it was answered above amongst the commons petitions; whereby it also appeareth that the printed books are mistaken in saying that it is ordained and established; for it is but the prayer of the commons (a part whereof is not recited) that it may be ordained and established; the king's answer being as above: wherefore,

SECONDLY, The words of this statute, as they stand upon the roll of petitions to which the king gave his answer, and upon the statute roll, which is extracted out of it, because they differing one from the other, and the roll  
of

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of petitions being the warrant for the statute roll, the sense of that act ought to be taken out of both: therefore these words are to be considered,

FIRST, What is meant by the words, *plee roial*.

SECONDLY, What by the words, *to answer anew*.

THIRDLY, What by the words, *a subversion of the common law*.

FOURTHLY, What by the words, *judgments given in all the king's courts, and in the king's courts*.

FIFTHLY, What by the words, *every matter that may be determined by the common law*.

LASTLY, What shall be said to be the first article of this petition, and what the remanent.

FIRST, By the words *plee roial*, for so they are written both in the title and in the preamble of this petition, and in the old printed books (*Placita Regia*, or *Regis Placita*) as they are often called in the laws of H. 1. c. 7, 9, 10. 34. 52. are to be understood, being the same as *placita coronæ*; for *lex coronæ* is all one with *lex regia*; as also *jura regia*; and *jura coronæ*. Vid. Leg. H. 1. c. 9. bis; 10, 13, 33. and the Register fo. 61; and *judicia regalia*, par. 2. H. 5. num. 15.; and *actio regis* and *causa regis*, Leg. H. 1. 34, 35. And the 4th Institutes 71. saith, they are called *proprie causæ regis*, because they are *placita coronæ regis*: and *placita coronæ coram rege in parlamento*, are at the end of each parliament roll.

THEREFORE by these words *plee roial*, pleas of the crown are understood; for the word *roial* in French (in which language this statute was made) can bear no other construction, but of something belonging to the king. And that sense doth stand well, both with the other words of this petition, and with the grievances of those times which occasioned it, as shall be shewn hereafter.

THE translator of this statute (as it is in the late printed books in English) doth render this word by *real*, whereunto it may be he was induced by the relation of it to *personel*:

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*personel*: but the word *personel*, standing in relation to *roial*, must signify pleas between party and party, and not draw *roial* to be *real*, in relation to it. But this construction of *roial* by *real*, the French language, as it is said, will not bear; nor must it be interpreted by *real*, as supposed to be mistaken by the writer, when it is twice written *roial*, in the parliament roll, and printed *roial*: and where *real* is to be signified it is written *real*, as *chose real*, *action real*, *service real*, and never *roial* to signify *real*.

AND if it were rendered by *real*, yet it were nothing as to the chancery; for in those times all trials between party and party for land, were for the most part by real actions, as writs of entry, writs of right, *assise of novel disseisin*, which last was the speediest remedy for the recovery of a man's right at common law, Westm. 2. c. 29. But now the practice of the law is so much altered, that these actions are seldom used, and almost antiquated; and instead thereof, actions of trespass, of *ejectione firmæ*, of *replevin*, are come up, whereby men are put out of their lands, and mean men are returned upon juries, which then they were not; and they oftentimes observe more a word of the judge than the testimony of the witnesses. But let the practice of the law be reduced to what it was in those times, and let no man be dispossessed of his land, but by a judgment upon a real plea, and the chancery will meddle with no such judgments. And acts of parliament must be construed and taken as the law was holden when they were made, 2 Inst. page 2.; for it is no reason to apply this or any other statutes to judgments upon such pleas as are invented since, and that age knew not or used not.

BUT the word being *roial*, must not be altered to serve a turn; for a syllable or letter could not be amended in a writ or process, but by a statute of 14. E. 3. c. 6.: much less can this word be altered; it must be taken as it is written, for acts of parliament are not within that statute.

SECONDLY,

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SECONDLY, The words, *to answer anew*, are considerable; for (as is said in the third reason), in the chancery, no man is put to answer anew. It is the plaintiff at law that is put to answer in chancery; and he cannot be said to answer anew, having never answered before; nor is any part of the same matter answered again, or in question in chancery, that was in question and judged at law: but because the plaintiff would by rigour of law, having gotten a judgment there, take a forfeiture or break a trust, he is put to answer that in chancery according to conscience; which matter neither was in question, nor can be determined by the common law, for the law hath no cognizance of it; and therefore those words do shew that it was not the chancery that was intended by this statute.

THIRDLY, It would be considered, what is understood by those words, *in subversion of the common law*.

THE common law doth seem to be set in opposition by some not only to the civil law, to the ecclesiastical law, to the statute law, but also to the chancery, and to the decrees thereof, as if those decrees were no part of the law of the land, and of the common law, and as if the lord chancellor were no judge of the law; for the petition saith, that such answering anew is in subversion of the common law of the land, which cannot be understood of the chancery, it being part of the law of the land.

BUT for the clearing thereof, it will be very requisite to look into the beginning of ours' and others' laws, as how that term of *common law* first began, the word *common* being never applied to one, but to many. As when two or more nations or people, which were formerly governed by several princes and several laws, were afterwards united under one prince and one law, then such laws were called common law. So we read of *Jus Commune Romanorum* that governed the whole empire; *Jura Com-*

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*Communia Longobarda & Romana*, when the *Longobardi* had conquered a great part of Italy, and were united to the ancient inhabitants, and others.

So with us, when the Saxons had conquered a great part of this island, and had set up several kingdoms in it, and had several laws whereby those kingdoms were governed; as the West Saxon law, the Mercian law, the Northumbrian law; and afterwards the Danes, prevailing, set up their laws, called of them the Danish law.

THESE several kingdoms coming to be united, and the name of England given unto this kingdom by them; and afterwards Edward (called the Confessor), being sole king thereof, caused one body of law to be compiled out of those several laws; and did ordain, that those laws of his should be common to all his subjects; and in those laws of king Edward the Confessor, that term of common law first began with us, being called common in respect of those several people that before lived under several laws, to whom those laws were now common; though in respect of the author they were called king Edward the Confessor's laws, or Saint Edward's laws. Ran. Cestr. Spelman, Stow, Speed, Daniel.

KING William the first did endeavour to abrogate those laws, yet was afterwards persuaded to confirm them; to which, notwithstanding, he added divers of his own; and after him king Henry the first did the like, both whose laws are lately published by a learned gentleman\*; yet when some of the succeeding kings, especially king John, did endeavour to overthrow those laws, the subjects contended for them; which contention brake out into an open war, called the barons wars, which took end in the granting of the charters of liberties, called the Great Charter, and the Charter of the Forests; though for a time those

\* Twissden.

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Wars broke out again, yet again ended by confirmation of those charters, as all our histories mention.

AND although those laws of king Edward have been much altered by king William the first, and king Henry the first, and many of them grown obsolete, and many customs grown up which now pass for our common law; yet in those laws of king Edward the Confessor, the word *common law* first began; and no man can doubt but king Edward's chancellors (whereof he had three successively, whose names are remembered to this day, and mentioned in the Fourth Institutes) were used by him, both in the compiling and distributing them, as there was occasion; for the chancellor and chief justice of England were assistants to the king in all judgments, for many ages before and after; and neither then, nor for many years after king Edward the Confessor's time, was the common law come to be a profession, nor lawyers made judges or pleaders.

IN former times the most learned clerks were best studied in the laws; so the clergy thrust into almost all places of judicature, when it was said, *nullus clericus nisi confidicus*: but king Edward the first, after the Conquest, being, as it is said, weary of the great power of the chief justice of England, was the first that altered that course by making laymen judges, who kept the robes of the former judges, as they do to this day; and then the common law came to be a profession and a study, and students of laws to be pleaders in courts, and after to be judges; and from that time the common law by degrees is grown to that height we now see it is come to.

It cannot be denied but that the chancery, as it judgeth in equity, is part of the law of the land, and of the ancient common law; and let it not be imputed to the chancery, that the lord chancellor hath too great an arbitrary power in making of his decrees: for if it be well observed, the judges use as great a power in declaring what is law,



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as the lord chancellor doth in declaring what is equity; and if either be covetous, timorous, or malicious, as much hurt may be done by the one as by the other; whereas, in truth, neither of them ought to proceed in doubtful cases without the judgment of parliament.

THEREFORE by these words, in *subversion of the common law*, the chancery cannot be understood as it judgeth in equity; for equity is and always hath been a part of the law of the land: *æquus justitia* is part of *recta justitia*, and precedes it, for it cannot be *recta* unless it be *æqua*. There is *lex terræ* mentioned in *Magna Charta*, wherein the chancery is included for equity, as well as the judges are for law; for *judicium parium* is of the fact only. The statute never meant that the jury should judge either what was equity or what was law, but left those to their respective judicatures, by those words *per legem terræ*.

AND that relief was given in equity in former times, appeareth by the law of King Edgar, c. 2. before mentioned. And by the laws of Henry the first, *graciosa placita soli justitiæ vel misericordiæ principis adhibeantur*, c. 11. And again, *Nemo apud regem proclamationem faciat de aliquo, qui ei secundum legem rectum offerat in hundredo suo*, c. 34. which is meant plainly by an appeal to the king.

AND after this statute of *Magna Charta*, it is said of Sylvester de Eversden (who was lord chancellor 29. H. 3.), that he was cunning in the customs of the chancery; which must be understood in judging of causes, not of making of writs, those belonging not to the lord chancellor.

AND by the statute of *Articuli super Chartas*, 28. E. 1. it is ordained, that no common pleas shall be from henceforth held in the exchequer, c. 3. whereby it appears that the law courts were not then settled.

AND on the other part the king wills, that the chancellor and the justices of his bench shall follow him, so  
that

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that he may have at all times near him some that be learned in the laws, which may be able duly to order such matters as shall come unto the court at all times, when need shall require, c. 4. The king had no chancellors then but bishops, and they were to order matters of conscience, as the judges matters of law.

27. E. 3. c. 26. In the printed books concerning merchants, right shall be done in chancery at every man's complaint.

36. E. 3. If any man be grieved contrary to the articles before mentioned, he may come into the chancery and have remedy without pursuing elsewhere.

PARL. 2. Rich. 2. numero 30. the commons petition, that the lord chancellor may make no orders against the law.

RESP. The use heretofore shall stand, so as the king's regality be saved.

AND again, in the same parliament, the commons petition, that no person should appear upon a writ, *de quibusdam certis causis*, before the lord chancellor, or any other of the council, where recovery is therefore given by the common law, which must be understood after judgment.

RESP. The king willeth as his progenitors have done, saving his regality.

PARL. 17. R. 2. c. 6. it is ordained, that the chancellor shall have power to award damages, according to his discretion, to such as shall be unduly vexed by writs grounded upon false suggestions.

So as judgments given in chancery cannot be said to be in subversion of the common law of the land; the chancery being a part of the law, and the judgments there being *præter, non contra legem*.

FOURTHLY, The words in the petition being *judgments given in all the king's courts*, in the plural, and the king's answer being only *in the king's court*, in the singular,

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gular, though the print makes it plural, cannot be extended to any court but to one, especially being an answer to a petition which was made in the plural; which court of the king can be no other but the king's bench, where pleas of the crown, intended here by the words *plee roial*, were held, and no pleas between party and party, unless it were very seldom, were then determined in that court.

FIFTHLY, Those words in the petition, *every matter that may be determined by the common law*, shew plainly, that there were some matters then in consideration that could not be determined by the common law, *viz.* cases of conscience, which matters cannot be denied to be proper for the chancery, as the chancery stands in a notion severed from the common law; for it cannot be thought that it could be the meaning of any parliament that those matters should not be determined at all, for then there should be a failure of justice; and those words can bear no other meaning, but that the law should determine those causes which are within the cognizance of it, and can be determined by it; but other matters which are not within the cognizance of the law, as equity, should be determined elsewhere, which must be in chancery.

AND if it be said that such matters ought to be brought and determined in chancery before they be judged at law, it is answered, that the judgment at law is nothing as to those matters, for, as it is said before, the common law has no cognizance of them; as in the case of a bond: the question at law is, whether it were sealed and delivered, or the like; and that being found by verdict, judgment followeth that the whole sum shall be paid; whereas the chancery examineth (not the sealing and delivery of the bond, but) what was at first due, what hath been paid since, what doth remain unpaid, and accordingly doth order the party to take but what is justly due unto him, with his damages and costs, and will not suffer him to take 800 *l.* because he had a judgment for so much, where it was proved that all was paid but 20 *l.* as the case was lately

lately in chancery, where it was decreed, that the party should take but what was justly due unto him, notwithstanding his judgment. But that decree, as the rest, if the chancery should be within this statute, will be judged unlawful, and the plaintiff at law shall have execution of that judgment for 800 *l.* where only 20 *l.* is due.

AND it is worthy observation, that these words, *every matter that may be determined by the common law*, are omitted in the printing of this statute: certainly there was no good meaning in the compiler, or in the printer, to leave them out, for they are in the roll of petitions in that parliament, to which the king did give his answer, and do serve as a key to open and expound all the other parts of this statute; *sed tulerunt clavem*.

LASTLY, It falleth to be considered, what shall be said to be, *the first article of this petition, and what the remanent*. The king's answer is, that touching the first article of this petition, as to judgments given in the king's court, he doth grant it; but as to the remanent, it is answered above amongst the commons' petitions, of which distinction there is no mention made in the printed books, but all is joined together, as if all had been granted, which again argueth the compiler or printer of no good meaning. Nor is this statute recited in the said Institutes. But to take the king's answer as it is, this statute must be divided into two articles; and the king's grant of the first cannot be extended to all, nor farther than the petition, nor the petition farther than the grievance, which was, *viz.* that judgments were questioned by the king himself, or by his council, or in parliament, which comprehendeth not the chancery; nor could the king understand that it did include the chancery, for then he should grant more than was demanded, and more than he intended: for he had denied before upon the same parliament roll to restrain his chancellor; and if now he should restrain him, he should

both deny and grant the same thing at the same time, as it were with the same breath. But the king denying the remanent, by saying it was answered above, that remanent must be something which was contained in a former petition of that parliament, and in this also. And in all the roll of that parliament there is nothing of this petition contained in any other, but only in that petition [*tit. Suggestions, num. 78.*] which the king denied, and that part of the petition is denied here also; for the remanent which the king's faith was answered above can bear no other meaning, nor refer to anything else. Therefore the words of this statute are not general, as the print would make them, but are restrained by the king's answer to the first article only, which is to *plee royal*, viz. pleas of the crown, and cannot extend to any thing that can concern the chancery.

AND if there were any doubt, king James's judgment has cleared it; for acts of parliament are *facta regum*, whereof Bracton saith the king is the only judge, *lib. 1. cap. 16.*

CONSIDERING, therefore, that these clauses are omitted out of the print, which are in the roll of petitions in that parliament; and that they do much conduce to the true understanding of this statute; and that there is such variance between that roll and the print; it is very requisite the print should be corrected, for it may make many to err that do not consult the petition roll in parliament.

THIRDLY, It is a good rule, for the understanding of this and all other statutes, to know what were the mischiefs and grievances in the kingdom, which the parliament meant to remedy. For, as it is observed in the 4. Inst.\* many records of parliament can hardly be understood, unless you join thereunto the history of the times.

\* 4. Inst. p. 52.

And whosoever will look into those times shall find that the great grievance of calling causes into question after judgments, were only judgments of treason, or misdemeanor against the king.

AND of such our histories are full. Thus king Richard the second, not much above four years before the making of this statute, had caused many to be questioned, and the duke of Gloucester his own uncle to be put to death, and after to be condemned; and likewise the earls of Arundel and Warwick, and the lord Cobham, to be arraigned and condemned; and the first to be put to death, the other two to be banished, the one to the isle of Man, the other to the isle of Jersey, where they were committed to perpetual imprisonment; and another lord Cobham likewise to be arraigned. Besides these noblemen, there were seventeen whole counties drawn in question for taking part with them, whereof many knights, gentlemen, and others, were grievously fined, some at 100*l.* some at 1000 marks; all which had their pardons by acts of parliament, 11. R. 2. c. 1. And some of them had special pardons; but those pardons were all made void and revoked by the king, with the assent of the lords, at the request of the commons in parliament, *anno* 21. R. 2. c. 2. Besides many, both in the city of London, and in divers other counties, were forced by king Richard the second to sign blanks, called Blank Charters, wherein the king or his council might cause what they would to be written; many of which blank charters king Henry IV. about two years before this statute, caused to be openly burned at the standard in Cheapside. And likewise in the beginning of king Henry IV.'s reign many noblemen were degraded by act of parliament, and divers were put to death, and many things were done not agreeable to the laws; for that was a time full of conspiracies, insurrections, rebellions, and war: those were the grievances which occasioned this petition, and

which the king was willing should be redressed, that men might live secure after they had their pardons, and after they were cleared by the judgment of law, and not be called in question, and have their pardons, patents, and estates taken from them by the king or his council, or by parliament, contrary to law. Other grievances we read of, none, that were considerable, or fit for the commons to petition against, especially so earnestly as to desire redress for God's sake, and for the preservation of all the estates of the kingdom.

LASTLY, The practice is to be taken into consideration, to shew how this statute was understood and expounded at, or soon after, the making of it; for it is a rule, that *contemporanea expositio* is especially to be regarded.

*Ret. Parl. 3. H. 5. num. 46.* the commons in their petition say, that the chancery did proceed against the law and defeated judgments of law; and pray, that no *subpoena* might be granted for matters determined at law, under the pain of 40l.

*Resp. Le roy aviseira.* "

*Ret. Parl. 1. H. 6. num. 41.* the like petition.

*Resp.* The statute of 17 Rich. 2. c. 6. shall be observed.

NOTE, That neither of these petitions do mention that such proceedings in chancery were against the statute of 4 H. 4.; which would not have been omitted, if the parliament had then thought that the chancery had been within it.

LIKEWISE in king Henry VII.'s time there are many precedents of relief given in chancery after judgments at common law, when cardinal *Moreton* was chancellor, and after, when archbishop *Warham* was chancellor, and ever since; but it appeareth, by that which hath been said before, that neither cardinal *Moreton* nor archbishop *Warham* were

were the first that brought in the precedent; and if they had, yet it is 160 years since *Moreton* was first chancellor; and the continual usage and practice since may very well admit it now for a law; for usage and ancient custom make law, 1. Inst. fol. 115. a. And although it were granted that no usage nor custom could hold against an act of parliament, yet against a construction of an act of parliament (where the words themselves are not plain and binding) usage and a continued course will hold; for in some cases it is said, that though the law, which was grounded upon an act of parliament, were thus, yet *aliter utitur in diebus nostris*, 4. Inst. 107.

MANY judges, when they sat in chancery by commission, in the vacancy or absence of the lord chancellor, have decreed causes there after judgments at law.

LIKEWISE in the exchequer chamber, dutchy chamber, in the courts established in the North and in Wales, and generally in all other courts of equity, matters have been called in question, and relieved since the making of this statute, without respect, whether they had been judged or not judged before at law.

AND it should be well considered, why this statute, and the other of 27. E. 3. should be so much urged against the chancery, and not be observed in the other courts. For the chancery is not named in either of them; and if they be general laws, Why should they not bind the common law courts as well as the chancery? For in those courts, besides errors judged in the king's bench, there is nothing more common than after judgments given in actions of *ejectione firmæ*, trespass, replevin, prohibitions, new actions are brought, and the same title tried again, and verdict given against verdict, and judgment against judgment, and suits carried from court to court, for one and the same right or title. How are the parties then, or their heirs, in peace that had the first judgment? it not being undone by attain or error, as this statute prescribes, neither of them being



excepted in that of 27. E. 3. nor their possession taken from them by a writ of an higher nature, but by bringing a new action of the same nature as the former, and questioning all again that was in question, and judged before; such actions being called *pick-purse actions*, as who hath the best purse will prevail: and no *ejectione firmæ* was brought against a stranger before the 14. H. 7. long after this statute; and therefore, though not within the letter, this is as much within the intent of the statute as any decree in chancery; and yet that must be upheld, although it was at first a question, whether it were not maintenance in the lessor to maintain such an action?

AND why should it not be as lawful, after a judgment at law once obtained, to plead this statute to a new declaration as to a bill in chancery? Wherein is the former judgment more undone by a decree, than by another judgment upon another verdict? And wherein are the parties made to answer anew in the one case more than in the other, if the chancery did disaffirm the former judgment, which it doth not? And if by difference of parties or actions things may be questioned at common law to overthrow or avoid the former judgment upon the same point of right or title, Why should it be excepted against, that the equity of a cause should be examined in chancery after a judgment which neither was nor could be in question before the judges at the common law? in the common law courts, all being brought into question again, the parties made to answer anew, and to answer the same thing that was answered and adjudged before; whereas in the chancery nothing of the former matter, nothing of the judgment is touched, but only the corrupt conscience of the party is corrected, because he would take an advantage by rigor of law against all equity and good conscience. There can be no question, that the chancery should be within these statutes more than the other courts; either all are bound by them, or all are free.

THE article against cardinal Wolsey, that he had examined divers and many matters in chancery, after judgments thereof given at the common law, in subversion of the laws, and made some persons to restore again what they had in execution by virtue of a judgment at common law, as it is reported 4. Inst. is too general and uncertain; for those matters might concern presentments to churches, prebends, or other benefices mentioned in the statutes of provisions, 16. Rich. 2. c. 5. or other matters that might be proper for the common law, and not for the chancery; or he might reverse the judgments in the points adjudged; for the cardinal did many things with a high hand, as appears by the other articles, and by his usage of sir John Stanley, mentioned in the 38th article, and then he was worthily complained of: but if they were matters fit to be relieved in equity (though after judgments at law), it is not probable that sir Thomas More would have set his hand to such an accusation, as knowing that to have been done before the cardinal's time, and by himself, as is certified by the referees, if this be a true copy; which may be doubted, because sir Thomas More doth sign before the dukes and other noblemen, which place was not given to the lord chancellor till after his death: and it is well known that the cardinal's man (Cromwell) did take him off from all accusations in parliament, yet this article was the cause of all the rest. The forty-four articles are printed in the 4. Inst. under the title of the Court of Chancery; but not mentioning what those matters were that the cardinal did examine in chancery, this doth fall off of itself.

AND for Throgmorton's case, so much stood upon, as wherein all the judges are said to have given their opinions; it was thus:

THROGMORTON being possessed of a term, by a grant from the crown, rendering a rent, with a proviso to be

\* 4. Inst. 91, 92.

† 4. Inst. 93.

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void for non-payment within forty days, and having made many failures, which appeared upon record, queen Elizabeth granted away the inheritance, which came to sir Thomas Heneage, and from him to sir Moyle Finch in right of his lady, who entered and sealed a lease to one Roots to try the title; and upon a demurrer in the exchequer, judgment was given for Roots, the lessee; whereupon Throgmorton brought a writ of error, upon which the judgment was affirmed; and after all that, he exhibited a bill in chancery, pretending, for equity, that the non-payment of the rent in 9. Eliz. was by the fault of a servant, and no wilful failure: to which bill sir Moyle Finch and Roots made answer, and did set forth several failures, in the 9th, 10th, and 17th years of queen Elizabeth, and at divers other times, which they alleged did appear upon record; and therefore, and for other causes mentioned in their answers, they demanded judgment, whether the court would hold plea thereof or not: and mr. attorney general, being of the defendant's counsel, moved, that the matter touching the lease whereof the plaintiff sought relief, might be dismissed; because the lease had been, by the opinion of the judges, adjudged to be void in the exchequer, for that the rent was not paid to her majesty within forty days, according to the conditional clause contained to the lease. To which motion mr. Philips, being of the plaintiff's counsel, made answer and shewed, that the default of payment in the 9th year of queen Elizabeth was not voluntary, but grew by the negligence of a servant; but that the rent was afterwards paid, and that the lands were enjoyed quietly by the lessee so long as the inheritance remained in her majesty, until the defendant's entry, and therefore prayed that the matter in equity might be retained. But, forasmuch as the cause was of great weight, and would be a precedent, the lord-keeper minded, before he gave any order, to confer with the judges; and directed that the bill, answer, and records, which shewed the defaults of payments, should be brought

brought to the judges, as appeareth by an order in chancery, 28th of May, 39. Eliz.

AND 15th of November following, the lord-keeper did declare in open court, that all the judges, except one that was absent, had considered of this cause, and were all (one of them that had not so considered excepted) of opinion, that the particular case, as it stood, was not meet to be retained and examined in chancery; yet his lordship said he would be advised, and give such order as should be meet; as appeareth by an order then made, which was the last in that case.

Now the particular case, as it stood, was upon the several forfeitures for non-payments of the rent; and, the bill seeking relief but against one in the 9th year of her late majesty, the rest of the failures being not mentioned, and the lease having been adjudged void in law, not only for the failure in the said 9th year, but for the other failures also, for which no remedy was sought; the case, as it stood, might not be held meet to be examined and relieved in chancery, for it stood upon divers failures, and likewise upon the queen's interest, against whom there was no equity to be sought in chancery.

BUT in all those proceedings it doth not appear that the lord-keeper did make any order to retain the bill, as is alleged, nor that there was any petition to the queen, nor any reference from her to the judges, nor any certificate of the judges, other than verbal, to the lord-keeper, as is said, and by him declared in court; none of which could be unknown to the attorney general, although now it be otherwise urged under his name in the 3d and 4th Inst. by which the statute is made the only reason of the judges opinions, whereas it doth not appear that this statute was once mentioned in all those proceedings.

SIR MOYLE FINCH'S answer is not to be found; it is not unlikely to have been burned when the fire was in the  
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Six Clerks Office; but it seems the cause was not dismissed, for there was no dismissal enrolled, nor any order for a dismissal entered, neither doth it appear that there were any further proceedings in it; but howsoever, that opinion of the judges being given upon the several forfeitures and the queen's interest, and the judgment that Throgmorton's lease was void, that case doth nothing concern the question.

THE inconveniences that would follow to the subject, if the chancery should not relieve after judgments in cases of frauds, breaches of trust, forfeitures, &c. where the common law cannot relieve, would prove so great and intolerable a grievance, that no man could live under such laws; for any man that will take advantage, may obtain a judgment at law before the other can get a decree, or an injunction in chancery, what equity soever the case requireth, and then he must be remediless for ever, and thereby all fraud, circumvention, corrupt crooked and unconscionable dealings of crafty deceitful persons would be countenanced, encouraged, and abetted, and the antient rules of equity and conscience smothered and suppressed, upon the imaginary credit and reputation of a judgment at law; which, though of great weight, may be unconscionably gotten, especially since all men know that not one judgment of an hundred is pronounced in court, nor the case so much as heard or understood by the judges, but entered by attornies, which then they were not, but pronounced by the judges in open court.

To all which it would be encouragement, to imagine that the makers of that law, 4. H. 4. did ever intend that such judgments entered so secretly and under-hand, that it is oftentimes difficult to find them, should not be examined, and the parties relieved; or that by those words in the statute, *after judgments given in the court of our sovereign lord the king*, they could intend such judgments as should

should be entered by attornies without the judges knowledge.

NEITHER can it be thought that the parliament, 21. Jac. c. 26. wherein attornies are excepted from being felons if they acknowledge judgments for any person without his privy, did intend either that the said attornies should be free from all punishment in such cases, or that such judgments should be of so great weight and force as never to be questioned, nor the party relieved, but utterly undone, because an attorney hath acknowledged a judgment against him, whereof he can know nothing till he be taken in execution.

FOR admit, as is mentioned in the Third Inst. 123. that the plaintiff doth by collusion retain an attorney for the defendant without the defendant's knowledge, and that attorney confesseth the action, and judgment is entered, must this judgment be binding for ever, and shall the defendant have no way to help himself? The book saith, that in this case the defendants sought remedy in parliament, and that the parliament did give power to the lord chancellor, by the advice of two judges, to hear and order the case in equity; whereupon it concludeth that the chancery could not do it without higher authority; which is no very good consequence.

FOR that case was a mixed case of equity to right the defendant, and of misdemeanor to punish the practice; and therefore required several judges that might inform the parliament of both; but that petition shewed, that the court wherein this judgment was given, could not give remedy in that case; and the reference shewed, that it was not conceived to be within the statute of 4. H. 4. For then the parliament, in its power of judicature, could not have meddled with it; and so that case must have been without remedy, as all others of the like nature must be, if this construction hold; whereof, no doubt, there will be so many,

many, that it were better to live under no laws than such as do give way to, and do not provide remedies against such mischiefs.

AND statutes being always to be expounded so as there be not a failure of justice, 2. Inst. 23.; and the chancery court being now the only ordinary remedy that is left to prevent and give relief in such cases; it is strange it should so earnestly be endeavoured to abridge it of that power, when this strictness to maintain the rigour of the law is observed no where besides. The parliaments of France, which are courts of justice, and the lords of the session in Scotland, where the chancellor hath the chief place, do minister justice, not according to the rigour of law, but with reason and equity, *Cambden in Scot.* p. 8. And must we, above all others, be debarred of that benefit, and left remediless, and the chancery tied up from giving relief, only upon inferences, and the construction of a statute wherein it is not named; the king too having denied in the very same parliament, and upon the same roll, to restrain his chancellor?

WHERE it was said that it is against a maxim of law for a man to help himself against a record upon a bare surmise, let it not be thought that the chancery doth help any man upon a bare surmise; for if he doth not bring very good proofs, the chancery doth dismiss him, and punish him by making him pay good costs, so far it is from relieving any that are causelessly troublesome: nor is the chancery to be guided by every maxim of law, but it is to controul such maxims as are against the law of reason, *Doctor and Stud. lib. 1. c. 17.*

AGAIN, it is worthy observation, that the judges themselves do oftentimes extend their directions, and do therein play the chancellors, to mitigate the rigour of the law after verdict, by staying the *posse*, and by consequence the judgment; and sometimes after judgment, by staying execution  
till

till the party will consent to take what they in equity think fit: by what law they do so, themselves best know. But it is as necessary that the chancery should give relief after judgments, as the judges to stay the judgment or execution, and themselves to order the matter in equity: but neither the chancery nor any other courts are within this statute, but only those which are named in it, which are the king himself, his council, and the parliament; and in cases only which concern the king, as hath been said, none of which concern the chancery.

FOR the meaning and true sense of this statute, as it stands upon the parliament roll of petitions, is, that no man shall be drawn into question, at the king's suit, which is expressed by the words *plee royal*, and put to answer again before him or his council, or in parliament, that hath been acquitted by judgment of the common law, as those were that had their pardons beforementioned, or such as should thereafter be acquitted by judgment of the common law; and in that sense this statute hath been observed ever since, and no such judgments have been questioned by the king, or by his council, or in parliament.

BUT it were a strange construction of this statute to say that the chancery alone, and no other court, should be bound by it, and that the parliament should give no relief in any case whatsoever after a judgment at law, be it obtained by corruption apparent, injustice, fraud, &c. and that the subject should be left destitute of all help after a judgment, unless he could overthrow it by attainting the jury, or by error; whereas an attain is so penal, that one jury will rarely attain another, for it may be their own cases; and error for the most part is in the pleadings; and the like strictness to observe the rule of the law must be held by the judges upon the writ of error, as was held in the former judgment.



To conclude, therefore; neither the words of this statute, nor the king's intention in granting part of it, nor the mischiefs before, that did occasion it, can maintain any such construction, that the chancery for matter of equity should be bound by it; and the practice in chancery, and in all other courts of equity since, doth shew plainly, that it was never so understood.

AND so king James's judgment stands firm.

*Virga aquitatis, virga regni tui.*

## No. III.

LORD CHIEF JUSTICE REEVE\*  
TO HIS NEPHEW. .[CONTAINING INSTRUCTIONS FOR THE STUDY OF  
THE LAW.]*Now first published from a MS. in the Possession of the Editor.*

**F**IRST read *Wood's Institutes* in a cursory manner with an intent to understand only the general divisions of the law, and obtain the precise ideas used in it: for such terms as *Wood* does not explain as he goes along, *Les Termes de la Ley* should be consulted, and, for the more full and modern explanation of the same, *Jacob's Dictionary*; but the authority of this latter must not be too implicitly relied on. The only reason why I mention *Wood* for the present purpose, is, because the terms will be much better understood by observing with what latitude or restriction they are used in the course of his work, than by consulting any dictionary whatsoever; and in order to understand his Chapter of Conveyances, it will be necessary to call in the aid of some old practitioner who is your friend. If the advantage cannot be acquired, you must be contented with such light as you can strike out of the modern books of practice, *Bohun's Institutio Legalis*, *Jacob's Attorney's Companion*, last edition: of all these I can give no other character than Martial of books in general, *sunt bona quædam*, &c.; nor any other direction concerning the using of them, but that you must, by the help of indexes, take what is to your present

\* Sir Thomas Reeve, lord chief justice of the common pleas, 9. Geo. 2.  
purpose.

## LORD CHIEF JUSTICE REEVE TO HIS NEPHEW.

purpose.' This done, read *Littleton's Tenures*, without notes; consider it well, abridge such part of it as the other books inform you is law at this day. Thus armed, venture upon *Coke's Comment or Institute upon Littleton's Tenures*, which being well understood the whole is conquered, and without which a common sound lawyer can never be made. To this, all the faculties of the mind must be applied; with hearty attention it will not be found very difficult, with the preparation already prescribed. After the first reading of it (for it will require many more than one), either abridge it throughout, or commonplace or compare it with some authentic Abridgement, sentence by sentence; and, by your own additions and corrections, make it your own. To this purpose I recommend *sergeant Hawkins's Abridgement*, which will afford much light to my lord Coke. This finished, I would recommend a second careful review of *Wood's Institutes*, with an intent to digest the several heads of the law, for the use of memory; and now it will be proper to read the more useful statutes at large, in the order in which he quotes them, and to examine the several books of Reports for the proof of his opinion, which alone is not authority, though he generally quotes very fair: and remember, if you read any edition of *Wood* wherein *Salkeld's Reports* are not cited, to consult them under their proper titles, which may easily be done, he having put them into the form of a commonplace.

**DURING** the second stage of study, many books may be brought in for variety, which will be very useful, and not interrupt the main scheme, as *Doctor and Student*, *Noy's Maxims*, *Curson's Office of Executors*, *Hale's History of the Common Law*, principally; with *Finch's Law*, and *Rolle's Abridgement*, in the preface; in which last you will find the best scheme for studying the law now extant\*. It will about this time, and not much sooner, be proper to give diligent attendance on the courts at Westminster, and to

\* In a subsequent part of this publication will be given the above-mentioned preface, written by Sir Matthew Hale.

begin

**LORD CHIEF JUSTICE REEVE TO HIS NEPHEW.**

begin orderly reading the several reports, which must be read and commonplac'd in such manner as (by the experience which by this time you will have of the nature of the study) you will be best able to advise yourself.

MY whole scheme, without naming many books, is no more than this :

FIRST, Obtain precise ideas of the terms and general meaning of the law.

SECONDLY, Learn the general reason whereupon the law is founded,

THIRDLY, From some authentic system collect the great leading points of the law in their natural order, as the first heads and divisions of your future enquiry.

FOURTHLY, Collect the several particular points, and range them under their generals, as they occur, and as you find you can best digest them.

AND whereas law must be considered in a twofold respect :

I. As a rule of action.

II. As the art of procuring redress :

when this rule is violated, the study in each of them may be easily regulated by the foregoing method ; and the books so recommended will so carry on the joint work, that with this course, so finished, the student may pursue each branch of either to its utmost extent, or return to his centre of general knowledge without confusion, which is the only way of rendering things easy for the memory.

No. IV.

CASE OF THE SHIP COLUMBUS,

IN THE COURT OF ADMIRALTY,

*WE* here present the Reader with the Report of a Judgment given in a Court whose proceedings are little known. The Courts in Doctors Commons lie in an obscurity which makes a singular mark of difference between them and the Courts in Westminster Hall. This perhaps is to be attributed to the persons themselves who are concerned in the practice there; for while the Common Lawyers are continually drawing the attention of the public, by printing what passes in their Courts, the Civilians have persisted in preserving an uniform silence. No Reports of adjudged Cases, no Arguments of Counsel, to form any sort of competition or comparison with the productions of the Common Law Bar; the learned and unlearned are equally uninformed of what is there transacted.

This is to be deplored in a country where the law of the land is founded on judicial determinations, and not on the responses of men in their closets; and it is equally to be wondered at, when we reflect, that the Gentlemen in these Courts have, from their situation, an advantage which better qualifies, and, it might be thought, would more dispose them to employ their pens in adorning their profession, than always happens to those of the Common Law; having necessarily passed academical education, and having usually attained, by their professional studies, a more than ordinary store of literature, and general knowledge.

The Reporter of the Judgment in the Court of Admiralty, which we now give to the Reader, has stepped forward to distinguish himself from his brethren, and has favoured us at once with a specimen of reporting, and with a picture of the judicial character now sustained by the Court of Admiralty.

*We*

## IN THE COURT OF ADMIRALTY.

*We are certainly laid under a great obligation by the spirit and novelty of this attempt; and it is to be hoped that others may be encouraged to make a similar experiment in the Prerogative Court, the Arches, the Peculiars, the Delegates, &c. &c. so that we may in 1790, being about 700 years since the Clerical Judicature was separated from the Temporal by William the Conqueror, begin to learn, from the mouths of its own votaries, upon what that Judicature is employed.*

*But while we are indulging this hope, others have shewn a solicitude to check the progress of this new undertaking. It seems, this Report was promised in the daily paper entitled "The Diary," some time before it appeared: but some Gentlemen, either disapproving the matter or manner of the judgment delivered; or disliking the conveyance of it in a newspaper; or, perhaps, preferring all the silence and inactivity of their predecessors to the display of the present occasion, had interposed with the Printer, to prevent the publication. This produced a pause of some days; till, at length, the Report appeared, with an Introduction prefixed, of some length. As this has every appearance of coming from the pen of the same writer, and contains some reflections upon the nature of the profession to which he belongs, it cannot fail of being extremely interesting, and we shall venture to give it at length, as printed in "The Diary."*

WE have had applications from a quarter where we should least expect them, for the suppressing the decision of the Court of the ship COLUMBUS, in the HIGH COURT OF ADMIRALTY. We do not mean that we have been applied to on the part of government, for whose conduct hitherto the decision is the best apology, and the only effectual correction of a mistake and omission in forming the act of the 27th of his majesty, by a reversal of a judgment in the inferior courts in the colony of Barbadoes, contrary to the intentions both of administration and the legislature.

In justification of our own resolution, we have to say, that the appeal interposed but not yet prosecuted, nor any inhibition served, as we are informed, is no reason why we should suppress our report, although the appeal were actually going on, and an inhibition granted by a court of delegates to stay execution of the sentence of the high court of admiralty.

How many decisions in Westminster-hall are reported in the books, which have been afterwards reversed in the house of lords? The votes, resolutions, and debates of the house of commons are daily reported without censure or restraint, although those votes, and resolutions, and speeches, are subject to be intirely invalidated in another house of parliament. The idea of suppressing a decision of a particular judge, on account of a dependency of an appeal actually prosecuted, or only interposed for form, sake, or for farther consultation and deliberation of parties, is as unworthy great lawyers, as it is of liberally-minded men, not narrowed too much by scholastic education, who think without prejudice, and act without fear. If any person has a right to object to a publication of the report of a decision, so far as it goes, it is the judge himself; but no man in that respectable situation would object who reasons well, who knows the constitution of his country, and reveres that which only can support it, the just liberty of the press, so long as it is without licentiousness, or an intencion to misrepresent, or do mischief. The known impartiality of our paper, and freedom from all factious principles, will free us from suspicion; and our general care to be as substantially and minutely accurate as possible upon all occasions, will preserve us from blame, if it does not from envy and jealousy; weeds, which grow rank every where, both in public and retired life.

With respect to newspapers we will venture to say, that the compilers and editors are respectable in every free constitution; we will not assume an higher epithet; and it will not be arrogant to say, that the circulation and faméliar acquaintance with the British prints and language have accelerated, if they have not occasioned, the Revolution in France in favour of a free constitution. While we deplore all sorts of personal invective, and the low scandal of private life, and see literary men making daily attacks on each other like the servile gladiators in Roman theatres for the amusement of the populace, instead of wringing to improve, instruct, and govern them, we observe with concern ~~the~~ <sup>the</sup> effects of that genius which are due to truth and to the public, and which might be better employed than in private personalities.

As vehicles of interesting facts, and observations to the public upon the very best information and authority, the publishers have a right to use the liberty of the press, and to leave the public to judge. That public, in which the true majesty (as it is called) of the people resides, is that majority of society to which all things and all persons must bow; that majority from whose consent, if abstract property does not originate, yet upon which hangs all actual right, title, power, dominion, and pre-eminence of things and persons. It is thus, whatever is said in public, and regards the public, becomes the right of the public to repeat and to report; the flourish of the senator, the argument of the counsellor, the decision of the judge,

judge, become the public property. Words have wings: they are no sooner uttered in public stations, than they are irrevocably passed to all mankind who are to be affected by them; the emanations of the soul, the thinkings aloud, are confined to no place, to no country, to no age.

We all know that the Greeks in general, and the most polished of them in particular, the Athenians, were fond of news. The Romans had their *Diaries* of every public transaction circulated in every part of the Empire.

Tacitus, in his *Annals*, Book XV<sup>th</sup>. refers to these *Diaries* for facts omitted by himself.

"*Diurna populi Romani*," says the historian, "*per provincias, per exercitus, curantur leguntur, quam ut non noscatur quid Thrasia fecerit*."

"The Roman public *Diaries* are read through all the provinces and armies with too much attention for it not to be known what has been the conduct of Thrasia."

The public prints of our own times contain all things divine and human; and though many great men have affected to despise them, and never to read them, yet most draw from them occasionally their sources of knowledge and conversation; as in other matters in human life, men pretend to contemn an object, because they would hide the source from whence they steal their ideas, and their treasure, but make use of the very thing, as their own, which they pretend to despise.

We therefore shall assert with our contemporaries our right, as vehicles to the public, to reports both of law, politics, and religion. As to any idea that the publication of a decision or intermediate decree, an appeal being asserted, or actually depending, may occasion the merchant to hazard a speculation; the man who entertains such an idea of any merchants or any men, must know little of men or merchants. They will not hazard; and here is the grievance, that the advising of an appeal, which stops commerce by a delay and suspense of some great question, perhaps is never to be recovered; as a river which once having been spread from its original channel scarce ever returns to it again, and leaves all behind it a dry and dreary waste. However, there can be no encouragement for speculation from the late decision of the *Columbus*, because the enlarged time granted by royal proclamation and suspension is at an end, and the act itself was only made to be in force until the 1<sup>st</sup> of April 1788, and no longer. The evil and the remedy have ceased together.

But a publication of the decision in the inferior court, it is said, may influence the public sentiment and the ultimate resolutions of the superior court. This is paying too great a compliment to the weight of one man's opinion, and a very

\* In all the editions of this author. the passage runs, "*curantur leguntur ut noscatur quid Thrasia non fecerit*;" but the sense and grammar must correct the above by the insertion of *quam*, and restoring *non* to its proper place.



bad compliment to the general good sense of mankind at large, or to the strict attention to justice and the capacity of the judges, who upon a new hearing are to judge of the reasons laid before them, either in the personal decision of the judge himself in the inferior court, from whom the appeal is made, or in the old and new arguments of the learned and ingenious gentlemen, who advise their clients to try the mind of another court, upon the old principle (whether a true one or not, may be considered), that in more counsellors and in more judges is multiplied wisdom as well as fees. Resident in all the power and majesty of the dernier resort. Justice is seen sitting, although at a distance, by every judge with reverence, from whose single opinion an appeal is made, and is worshipped as his own consolation and justification from consequences by every man of integrity who knows the fallibility and capriciousness of human nature, and the twisted understandings and corrupted hearts of men who delight in strife.

We should feel infinite pain, if we found that we had justly offended very respectable persons by any thing said in our former notice.

When we likened the arguments of the civilians to collegiate lectures, we did not ourselves entertain an idea of academical lectures having any thing in them *ridiculous*. We meant on the contrary to pay a just compliment to both, and to give an impression, that those arguments were like the lectures, long, elaborate, and full of the most profound erudition and general instruction.

We respect extremely the two universities; and, whatever ridicule ill-judging or ill-disposed persons may attempt flinging upon them, we are of opinion that the academical lectures of the professors and tutors have this particular use, to make some young men hear, who otherwise would never read; and that these lectures answer the same purpose to young men of fashion, as an attendance upon the courts of justice and parliament would do for the improvement of their minds.

When we likened the arguments of the civilians also to those which the Neapolitan lawyers entertain their visitors *gratis*, we meant that they were equally amusing to the auditors, being without adequate fees for their labour and study. The civilians in this country are nearly upon a footing with the *Tratati & Uffizi* at Rome, who gave to their clients all their eloquence without pay, excepting that the latter returned the obligation by their fortresses, and helped to advance their patrons to all the honours and emoluments of the state.

The great seminaries of Westminster-hall, with whom are deposited the lives, liberties, and fortunes, of their fellow subjects, merit what they gain; and when they unite the character of the scholar, the gentleman, and friend to their country, their rewards cannot be too great. In the mean time, the advocates of the civil law exert in the courts ecclesiastical and

and of admiralty, after a long and expensive education at one or other of the two universities, a graduation of eleven years, and a silence of one more in the courts, at a time of life too late to go elsewhere, sit down in a kind of monastic way, blinding their eyes with making their own close books or briefs, and arguing whole forenoons for perhaps a fee of two or three guineas, while a gentleman of eminence in the common law receives three hundred for pleading his hour by the town clock at an assizes in the country, perhaps not more than twenty or thirty miles distance from the metropolis.

Near one-third of the British Peccage consists of the descendants of common lawyers: so attentive has the crown been to engaging their attachment at all times.

In a century and an half the civilians have only furnished two secretaries of state, one minister plenipotentiary, two privy-councillors, two commissioners of the admiralty, and a treasurer to a princess dowager. This is not to be wondered at, for about half a dozen advocates make the whole of their effective bar.

At the same time, we may observe, that in no court more brilliant and classical wit is exercised upon proper occasions than by some of the advocates at Doctors Commons of the present day.

"Ridicule," said lord Shaftesbury, "is the test of truth." Some people have doubted of the axiom: but his Lordship was right, if he meant, that true ridicule, or ridicule founded upon truth, is the test of truth, as metals are tried in chemical process one by another; and therefore some sort of vivacities are to be allowed at the bar, and even upon the bench.

There are indeed men who, forgetting the observation of a sensible French writer, that gravity (we suppose he meant a constant gravity) is an exterior appearance of the body to conceal the defects of the mind, dread every approach to jesting; and think it almost criminal upon the bench, though not quite so much so at the bar. Men dressed in buckram, or in complete armour, like the man of the company of armourer, or the show of a lord-mayor, have no occasion to be afraid of flies. It may be remembered, that in all times a little vivacity has been indulged upon the bench. At the bar whole arguments (if they can be so called) have been filled with wit to make amends for not reading a brief before, and which the client has found to be no jest to him. A descendant of lord Coke, upon reading the writings of that great lawyer, said he was surprised that his ancestor had written a jest-book as well as a law book. "Jefferies never jested." Lord Somers was all ele-

\* Perhaps not so much as some judges; but yet enough to draw upon him, by *unseasonable* sallies, the following distich:

"E'en than *L'Estrange* a more admir'd prater,  
Wittier on bench than he in *observer*."

gance, and an excellent poet and classic. The earl of Hardwicke wrote essays in the Spectator. Lord chief justice Willes is remembered for his wit and vivacity, and his son had his father's liveliness. Other judges have shone as men of wit as well as of deep understandings. The last lord Lyttelton says in his Letters, that no person ever possessed more true attic wit than the earl of Mansfield. Applied to proper persons and to proper occasions, his lordship's wit has always its due effect, and scarcely any person to whom it was directed went away offended.

*"Ridiculum acri*

*"Fertius et melius magnas plerumque facit res,"* "

said the Roman poet, who knew mankind well.—A stroke of wit, in his opinion, often decided many an important cause with more clearness than a formal argument, by shewing absurdity when it was truly to be found.

After all, in spite of our extreme attention and wish to be accurate, if we shall fail in any part of our reports, it is some consolation to us, that even such reports may have their use, inasmuch as it was the opinion of a once very great lawyer, that for the purpose of furnishing an argument, one bad report is worth to the profession an hundred good ones.

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### HIGH COURT of ADMIRALTY.

FRIDAY, Dec. 18, 1789.

APPEAL FROM THE COURT OF VICE-ADMIRALTY  
OF BARBADOES.

Paul Le Mesurier, Esq. Owner of the Ship Columbus,  
and her Cargo, Appellant.

—His Majesty's Procurator General, David Parry, Esq.  
Governor of Barbadoes, and Samuel Dearsley, Esq.  
Acting Collector of his Majesty's Customs in the said Island,  
Respondents.

"**A**S this case is a leading one to many others depending in the high court of admiralty as a court of revenue and appeal from the plantations, and which wait for the decision of the present question, the importance of it is obvious;

obvious ; particularly as it is one among the many questions which the revolution in America has given rise to. That event has spread over all Europe a new face, both of legislation, policy, and commerce. It will every day have new consequences. It has given birth to new laws and experiments of government, and of course to new litigations upon the liberty of trade and the rights of property."

AFTER some observations nearly to this effect, the judge, sir James Marriott, went on as follows :

" THE king's advocate has very properly called the case a very *involved* case. It *involves* the operation of a new and experimental law, the 27th of his present Majesty, whereby lumber imported from any of the ports of the American States is prohibited, if brought indirectly from any foreign plantations ; it involves the general law of forfeitures under the several acts of trade ; the powers of the board of treasury and customs ; the conduct of the president and committee of the privy council, acting as a board of trade ; and of the then secretary of state ; the policy of the act in its principle and the novel authority of the crown under the especial clauses of this act to dispense with the law of parliament.

" This is the fourth day of hearing this cause. I felt with pain at the outset the exceeding weight imposed upon the mind of the person who may happen to sit in this chair as a judge of revenue. The revenue laws are necessarily to be supported as the nerves of war and peace, and the column on which the public credit of the nation intirely rests : at the same moment I felt that the stretching these laws beyond a certain point might destroy that very liberty, and commerce, and property, which they were meant to support ; that a severity ill-judged and exercised with avidity and rapacity for the sake of forfeitures to informers and officers, or inconsistently with law and equity, may render  
the

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the revenue a devouring animal, which shall at last seize upon every thing, and root up the tree to gather the fruit. The extension of the laws of revenue to an extreme, has been, among many other causes, a principal one of the revolution in a neighbouring nation. God forbid we should any of us ever live to see it so in our own!

“ The arguments of the counsel on both sides have been strenuous; they have been brilliant; and particularly on the part of the crown\*. I have heard very long lectures upon the *duty* of the court in causes of revenue, and I have heard them *without dissatisfaction* (to use the words of the king’s advocate): I have heard them with patience, which has ever been the characteristic of the high court of admiralty, and I hope it will always continue to be so.

“ It is true, that upon the first opening of the cause I recommended counsel to the counsel for the crown in their proceedings against the subject in causes of revenue; and that I did hope they had been properly consulted by the parties, consistently with the rank and trust which the officers of the crown hold for his majesty and the nation at large; for that occasions have happened, when the law officers of the crown have thought proper not to risk the honour and the justice of government, but to throw up their briefs.

THE advocate-general has exculpated himself in his reply, That he has been applied to only as an individual from individuals, his clients having interest in the forfeiture; and I am glad to hear him say, that he has heard what dropped from the court without dissatisfaction. He has stated the case of his parties: it is my duty to hear. He has done his clients ample justice;—and the court will do the same.

“ But I do expect, and desire it may be known, that no persons should be encouraged to come into this court using

\* Sir William Scott, Dr. Lawrence, for the crown.  
Dr. Nicholl, Dr. Arnold, for the respondent.

his majesty's name, and proceeding as well for his majesty as themselves, without the business originating with the proper law officers of the crown in this court, upon proper reference and attendance.

"The recommendation of candour in this cause, I deemed the more necessary, as I thought I observed a spirit in this cause not to be approved; as if the spirit of revenue laws, which began in a reign not very favourable to liberty, that of Charles II. and which were meant first to fill the personal coffers of a newly prince, and afterwards, on better principles, to support a revolution in favour of liberty, had habituated the boards of revenue to consider the causes of their officers as if proper to be maintained, at all times and under all circumstances, as their own, and of the sovereign personally; and as if this court were too weak and too insignificant to enforce its decrees, or the law officers of the crown here, to be attended to; and as if this court were a rival to their own jurisdiction, in which there may be room if there were no check, though I trust it is never so exercised, for personal favour, political interests, and solicitation.

"As the ship sailed before the existence or even perhaps the contemplation of the act of the 27th of the king, and arrived at Barbadoes at the time when the operation of the act was dispensed with and suspended, as far as a report of the committee of council and the exercise of the power of the crown through the medium of a secretary of state, could dispense with or suspend the law and bind the crown by its own act, it was natural and right that the court should wish to see the order of council. On the opening of this cause, it was suggested by the counsel for Mr. Le Mesurier, that frequent applications had been made by him to government for a copy of the order of council. Now, if such an order had existed, and been produced, it would have prevented this flood of litigation. Mr. Le Mesurier would not have heard

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so many brilliant arguments either for or against himself, nor the court have had the fatigue of watching them with extraordinary attention. In any cause where the crown is a party, it is to be observed, that the crown can no more withhold evidence of documents in its possession, than a private person. If the court thinks proper to order the production of any public instrument, that order must be obeyed. It wants no insignia of an authority, derived from the crown. The order will enforce itself; for if a party suing refuses to produce a necessary document, what follows? He shall take nothing by his petition. In the court of prize this has happened, where a party has refused to obey an order.

"An affidavit has now been produced by Mr. Le Melunier which obviates every difficulty on this head, and the content of it will come hereafter to be considered under its proper head.

"The advocate-general (Mr. William Scott) has stated the case with so much liberality and exactness, that I cannot do better than to follow him.

"The fact is, the ship Columbus, built in one of the islands of Bahama, and duly registered at the port of London, duly cleared out and sailed from London in ballast, November 14, 1786, for Gottenburgh, in Sweden. There the master, captain Guerin, took in a cargo of dried herrings. The mariner's contract expresses, that the intended voyage was to be from London to Gottenburgh, from thence to Tobago, and elsewhere; so that she appears clearly to have been a carrier ship upon a general voyage in search of freight. She accordingly sailed from Gottenburgh the 14th of January 1787, for Tobago. Meeting with a hard gale of wind, and being in want of water, she put into Madeira on the 7th of March, to water and repair. The master, Daniel Guerin (who had made a protest before the British consul there), took in Madeira wines in barter for some of the herrings, and having repaired his ship and taken in water

water and other necessaries sailed for Tobago; where he arrived the 2d of April, and there, by permission of the French governor, that island having been ceded to France by the last treaty of peace, the captain disposed of the remainder of his herrings and part of his Madeira wines, for landing of which he obtained a permit from the French custom-house at Tobago, except ten pipes, two hogshheads, and three quarter casks. While the ship was laying at Tobago, he purchased on behalf of and shipped on account and risk of his owners, Paul Le Mesurier, esq. and Co. from Dan. King and Co. calling themselves British merchants residing at Tobago, the following articles of lumber, viz. 79,300 feet of white pine-boards, 23,294 feet of ranging timber and scantling, 18,625 staves and heading, 12,750 white pine shingles, 2,075 wooden hoops, and 56 white oak shecks, the growth of the dominions of the United States of America.

"The claimant and appellant state, that they were so shipped to be imported into the island of Barbadoes, with an intent for the said ship to take in a lading of sugars for London upon freight.

"The master at this time had received no information of the passing the act of the 27th of his present majesty forbidding such importation indirectly from the ports of the United States of America. The master, having completed his lading at Tobago, purchased from a French vessel laying there, twenty-three or twenty-five dozen of claret in bottles, as stores for the ship's use, stowed them with other liquors in his lockers in his cabin, and on the 24th sailed for Barbadoes. This claret was purchased partly by Madeira wine in exchange, and partly by a small bill of exchange—Upon whom it was drawn is not material: but captain Guerin says it was drawn upon Paul Le Mesurier and Co. of Havre de Grace, in favour of the French captain Falaise.

"On



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" ON the 7th of June 1787, upon the moment of the ship's arrival, before she could come to anchor, she was seized by mr. Samuel Dearsly, then acting as collector of the customs for the port of Bridgetown. An information was filed in the court of vice-admiralty at Barbadoes, by Dearsly, charging this coming-in as an importation into the island of Barbadoes, contrary to several acts of the revenue, particularly the 12th and 15th Charles II. and the 4th and 27th of his present majesty, and his royal proclamation of the 8th of April 1787; that part of the cargo was put on board at Tobago, an island in the West Indies belonging to the French King; that it was the growth and produce and manufacture of the United States of America, the *property* of the subjects of the said States or some other foreign state; that the wine, being the growth and produce of Europe, was not shipped in England but at Tobago; that on his arrival the master did not make a full report of his lading, and that ten casks of wine and other goods were found on board after the master had made his report.

" ON the 30th of July 1787, a claim was given by Allgood William Wallis, of Barbadoes, on behalf of Paul Le Melurier and Frederick Samuel Secretan, of London, merchants, for the ship and cargo. In the interval, in consequence of a report of the committee of his majesty's privy council for the affairs of trade, dated ———, and his majesty's instructions to the governor and council of Barbadoes for the *suspending* the act of the 27th of his majesty, signified in the dispatches which were sent on the 28th of May, the day after the ship sailed from Tobago, a proclamation, reciting the emergency and the instructions, was published at Barbadoes on the 15th of July following.

" YET, notwithstanding this proclamation and intervention of the suspending power, the cause was prosecuted by the seizer and by the king's own law officers; and that too so late as November 17, 1787. The judge of the vice-admiralty court condemned both ship and cargo; and  
although

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although the same should happen to be restored, the appellants will be very considerably prejudiced by the loss of freights.

“ A NUMBER of witnesses were examined ; and the captain himself being examined by the informants, his evidence was made their own.

“ So far as regards the fact of destination of the voyage, the character of the ship, and property of both ship and cargo, as belonging to mr. Le Mesurier and Co. there seems to be no dispute. The dates of the transaction are material. It is observable that the prohibitory act of the 27th of the king received the royal assent the 30th of March 1787, was published in the Gazette the 4th of April following, and was known at Barbadoes on the 23d of May, the very day before the emergency was known. That on the 29th of the same month, mr. Wallis, agent of mr. Le Mesurier and Co. apprehensive of their ship being likely to be confiscated whenever she came on, applied to the governor, mr. Parry, on the 29th of May, praying that the ship might be permitted entry.

“ THE governor's answer (as it appears by the evidence of his secretary, mr. William Southwell, and annexed to the petition of Wallis, letter D. dated March 29, 1787) was as follows :

“ THE mode of trade carried on for some time past with the foreign Islands and Settlements, was at all times contrary to the acts of trade, and the late act of this session renders it impossible for the Columbus to enter lumber at this island.”

“ D. PARRY.

“ N. B. The petitioner has had time enough to stop the ship.”

“ Upon this state of the facts, the issue has been taken,  
“ Whether this was an importation contrary to the statute ?”  
says

says the king's advocate; to which dr. Nicholl, counsel for mr. Le Mesurier adds, "with an intention to defraud his majesty's revenue;" and this is well put, as the addition makes a part of several statutes relating to the revenue. The king's advocate has quoted the preamble of the famous and leading act of Charles II. best known by the name of the Navigation Act, which expresses, that the act is made against any intention to defraud his majesty of his customs: therefore I shall take what is proposed by the advocates on both sides as one proposition, and as the true and fair issue in this cause.

"It has been urged, on the side of the respondents, that there is no equity for the subject; that it is the duty of the court, *ex officio*, to be the protector of the revenue of the crown; that it must yield in nothing to its feelings for the hardship of the case, but enforce the letter of the statutes, regarding the revenue as of *stricti juris*; and that the *onus probandi* rests always with the subject; that the commerce and property of the subject, and the revenue of the crown, are in a state of hostility; that the subterfuges of the trader to escape the laws of revenue must be severely guarded against; that no evasion of the law must be permitted; and that there is even a *constructive* infringement of penal laws, which are made for the support of public credit.

"In considering this argument, the jurisdiction of the high court of admiralty in causes of revenue, by appeal from the British plantations, first calls for attention, as a court which has a mixed authority, to be both as judge and jury, to determine both the law and the fact; which make together (what mr. Locke and the metaphysicians call, however distinguished, and whether rightly or wrongly distinguished, it is not now necessary to be considered, by some persons in point of law) a mixed mode, or complicated idea. It is also a court of equity by its original constitution, being particularly

larly directed in the patent of the judge "to *have regard always to the equity of the case,*" &c. &c.

"THE COURT of admiralty derives no jurisdiction in causes of revenue from the patent of its judge, or from the antient, customary, and inherent jurisdiction of the prerogative of the crown in the person of its lord high admiral, and exercised by his lieutenant; not a word is mentioned of the king's revenue, which seems to have been entirely appropriated, by the antient course of common law, to the court of exchequer, which is both a court of law and equity. If therefore there is any inherent prerogative right of judging of seizures upon the sea, for the rights and dues of the crown, whether of peace or war, as in the right of prize and reprisal, that prerogative jurisdiction is put in motion by special commission or by act of parliament.

"The first statute which places judgment of revenue, in the plantations, with the courts of admiralty, is the 12th of Charles the 11d. chap. 18. sect. 1. which act has been followed by subsequent statutes.

"ARBITRARY as those times were, and needy as the prince was, who considered the revenue as personally his own, yet, the legislature having held out the strong bait of forfeiture to be divided between the king, the governor, and the informer or seizer, it saw the necessity of placing a remedy and a relief for the subject in a court, both of law and equity, where the cause might be heard in the last resort with the utmost purity, and without influence.

"If the merchant and subject were to feel the rapacity of a governor or officer of revenue who is without ears or moderation, or that the judge of a court of admiralty in the plantations might feel his dependance on the sunshine of favour from some governor used to military command and ideas, or fancy himself that he personally obliged a sovereign (for nearly such is the language of the decree appealed from) a redress might be had such as mr. Le Mesurier now seeks. Whether he is entitled to it from me will be considered

more minutely. If the officers of the crown shall not be satisfied with my decision, and my reasons, they will go to a court in dernier resort, where the judges of the common law and civilians sit as delegates under his majesty's *commission in chancery*. I can only say, that I feel too much the increase of the business of this court, more especially if it is to be loaded with important questions of new laws of revenue. It is my comfort to do equity, that my poor opinion is not final, and there is an appeal. "

" THIS court has but one eye; the court of delegates will have many eyes, and most enlightened views. The fortunes of individuals, the fortune of the kingdom, rest on a due observance of the laws of revenue. The revenue is no longer that of the king personally; it is the property of the public; it is yours, it is mine, it is every man's who has any part in the public debt, or in the circulation of property of every kind which represents a value, and is represented by it. His majesty is interested as the great trustee for the public, and for his crown. Whosoever brings forward, or supposes his majesty to have any direct personality or responsibility, which seems to have in some former times been the idea of some boards (it is clearly that of the judge now appealed from), he is a bad friend, a bad lawyer, and a bad subject.

" THE arguments of the counsel for the crown, who have read long lectures to the court of its duty (without being interrupted), that the court must have no feelings of favour to the merchant and subject, go no farther in point of strict law, and the black letter of the Statute Book, than that under certain circumstances and appearances, upon first view, the presumption lies against the trader, for having neglected to provide himself with proper documents, and for not having complied with the formal line marked out for his conduct as to entries, &c. directed by the statute.

" This act says, however, no more than the act of the 4th of his present majesty, c. 15. sect. 45. which enacts that the

*onus probandi* (or burthen of proof) shall rest upon the claimant; and that where probable cause of seizure shall appear, the claimant shall have no costs; and from which may be inferred, by the by, that when there is no probable cause of seizure, the claimant shall have his costs.

“ Do not all the acts for condemnation of prize and reprisal of war say the same thing? and yet under those acts there is restitution. The principle of both the law of trade and war is the same: “ Your property and intentions are “ doubtful. Clear up your property and your intentions.  
• “ Justify your intentions, and have your property.”

“ THROUGH the whole of the cause before me, there is not a fact in which the advocates on both sides are not agreed. Nor has the property of *mr. Le Mesurier* been a moment in question; except whether twenty-five dozen of claret should be carried finally to his account current, or to that of the master; a point which is really too ridiculous to have so much time spent upon it, and is unworthy of all that eloquence which has been heard this day; as if we forgot the shortness of human life.

“ BUT it is said, “ the statute of the 27th of his majesty “ is peremptory. It enured before the seizure. It was “ not dispensed with by the governor by advice of his “ council, upon the arrival of the ship *Columbus* in Carlisle “ Bay, on June 7, 1787. And if the act was not “ dispensed with, neither shall this court dispense with it by “ any retrospective operation.” This is so argued; and “ that the court cannot determine against the law.”

“ DR. Lawrence has pressed upon its attention and veneration for a very great character, who is venerated by the present, and will be more so by a future age, *livore epulto*, a speech in the house of lords. Whether the words were spoken as by a peer, or as by an advocate, or what were the circumstances and merits of the cause, has not been stated.

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“ IT is to be supposed the appeal was upon some writ of error, from some court of common law : the language held in it is said to have been as follows :

“ MY LORDS,

“ HOWEVER disposed you may be to relieve the appellant, however hard the case, yet your lordships cannot fly  
“ in the face of the law.”

“ To this it might have been answered by one advocate to another, or from a peer who might differ in opinion to a peer,

“ THIS is to say, that your opinion is the law : but  
“ whether that opinion is law or not, yet this assembly  
“ cannot determine against the law ; because whatever it  
“ shall determine, being in the last resort, and paramount to  
“ all other judicatures, will be law. It is a court of law  
“ and a court of equity ; not merely of a technical,  
“ abstruse, metaphysical equity, but it will do substantial  
“ justice upon every special case.”

Now, as to the distinction taken between courts of law and equity, when it is said that courts of common law shall judge according to the strict custom and letter of the law, and that a court of chancery, or equity, as it is called, cannot judge contrary to the law, what does that mean, if upon consideration, in both theory and in practice of the courts, it appears that equity and law are for ever inseparable ?

“ To decide what is the common law or immemorial custom of the realm, and apply it to the fact, without regard to differences, times, manners, convenience, or inconvenience, is to be sure purely and simply to judge of law. But is that so done, when the reasonableness of a custom is called in to guide a decision, and adopted as a principle ?

“ WHERE is the simplicity of law, according to the letter of a statute, if it is to be interpreted in Westminster Hall, whatever the movers and framers might avow their intention to have been ? If the public or political inconvenience

nience is to be considered, what is it but to new-make the law of statute upon assumed principles of equity, and to turn, as it were, the bar of iron again upon another anvil, and to give it whatever new shape and force the second workman fancies?

“WHAT is it, in words of mixed modes, that is to say, of complicated ideas, but to divide the complex of fact and of law, and to take the interpretation of the latter? There are ideas which as necessarily adhere together in the mental world, as the elements adhere inseparably in the natural and substantial world; and you cannot more separate law from equity, and equity from law, in certain cases, than you can cut off the flesh of living animals, without taking the blood and moisture with it. If law is contrary to equity, and equity is contrary to law, then a court of chancery is not able to decide at all; nor can the house of peers do ample and substantial justice.

“To apply this sort of possible reply to the present case, the court of admiralty is a court of mixed jurisdiction. It will judge of the custom or law of the sea, the custom of civilized nations, and the common sea law of the realm. It will judge, as other courts do, of the letter, the spirit, and the policy which dictate a statute; and in the blended character of judge, jury, and keeper of the public and royal conscience, determine *ex æquo et bono*; *boni viri arbitrato*, by what is right and fair, and with the judgment of a plain man; for that is its *style*, and that is the genius of a court formed for the businesses of plain men; who in a maritime life, of all mortals upon earth, are freest from subtleties in their habits of acting and thinking. Its legal processes are adapted to the subjects and the people: as cardinal Bentivoglio said of the Swiss, “they were plain good people, “fitted for their mountains, and their mountains for them.” This shews the impropriety of the interference of other judicatures, built on the same prerogative, to destroy the most useful prerogative in a court of equal antiquity, by



interfering only to disturb that equity and that justice which they cannot do to the subject, as vehicles and measures of right and wrong which cannot fit the case ; and, therefore, the same acts of legislature which made commissioners of revenue, who are collectors of revenue by office, to be judges, gave at the same time to a court of admiralty a power, as to a court which is free from bias, to relieve the subject from the extreme rigour of the letter of revenue laws, and to judge of the equity and policy of any act regarding the revenue.—So much for the argument taken by the advocates for the respondent, “ that this court cannot judge how the letter of the act of the 27th of his present majesty is to be understood, nor raise any equitable construction from the general text or particular clauses or expressions.”

“ As to the policy of this act, no more need be said of it than, to save the credit of those persons who introduced it into parliament, that the policy of this act seems to be the same as of the navigation acts—to confine commerce and duties to the mother-country : that it is a novelty, by lodging a dispensing power in the king and council, or in the governor and his council to dispense with a penal statute ; but it must be observed too (on which much turns in this case), that this dispensing power was to operate for the relief of the subject, and not against it : lastly, that this act was made only in the spirit of experiment what the business would bear, in consequence of the astonishing revolutions of commerce and power, since the emancipation of the British-American Colonies from the controul of the mother-country. ”

“ PERHAPS the politicians of the age, fond of novelties, and every man in it almost thinking that he can figure in reformation, had better wait before they regulate too hastily so complicated, so refined a thing as commerce. Its workings escape the most microscopic eye of the politician and financier ; and trade resembles in many cases the sensitive plant : touch it, and it shrinks ; press it, and it dies.

“ IT

" IT must be allowed that trade, like certain trees, may flourish and bear the more fruit from being pruned and clipped; but it must be done by the hand of a very great master, and be adapted to the soil and season. Such were the acts of navigation, to which this country owes its wealth and power, and was obliged for them both to a usurper and to a monarch not greatly revered in history. These acts were fitted to the times and the men. What the present season and times or men will bear, no man can tell; except that both in counselling and judging we must beware of the *vertigo* of giddy-headed experiments.

" THE short period for which the act of the 27th of his majesty was made, shews the idea of the makers. This will hereafter apply, when we come to consider the conduct of the governor, who is one of the respondents.

" IT is not very astonishing, if one considers where such bills are fabricated, by solicitors of boards or their clerks, that there should be so glaring a defect in this important act, as that when it carefully provided for a short experimental duration, it should have no limitation of time, before which so many hundred carrier-ships of British subjects should be made forfeitable, then floating on the seas, in *unknown* situations and *distant voyages* in search of freights.

" THAT this defect should have escaped the sagacious, penetrating, and attentive genius of the noble lord at the head of the committee of council for the affairs of trade, is remarkable. Distinguished for his long and enlarged views, and knowledge of treaties, as his lordship is, it is wonderful it should not have been recollected, that there is a limitation of time in all treaties respecting captures.

" THE act of revenue of the 26th of the king, cap. 40. sec. 32. by which special periods are fixed for the commencement of the several regulations contained in it regarding forfeitures of ships and cargoes, might have furnished a model.

" THE act of the 27th of the king was opposed on its first appearance by a very strong opposition; and it is

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wonderful that administration did not catch a spark to see its way from that torch which has enlightened many a minister.

" SCARCE had the act passed, and before the paper was well dried on which it was printed, it was found *expedient* by government to suspend the execution of it.

" THE act received the royal assent March the 30th.

" WAS published in the Gazette on April the 4th.

" AND the dispatches of lord Sydney, the secretary of state, with the orders for the suspension, were dated May the 25th.

" THE petition presented by Wallis was on May 29, for a suspension, which the governor refused.

" THE ship was seized June 7.

" THE governor's proclamation of a suspension was July 15, and the sentence of condemnation was Nov. 17, four months after proclamation of the suspension, as appears by the process, and by the affidavits of Mr. Le Mesurier. The effect of that suspension will be considered in its proper place.

" IT was an objection taken *in limine* by the counsel for the appellants, that the seizure was made by one of the respondents, Mr. Samuel Deersley, without lawful authority; and were that true, it would not only affect the present case, but many other seizures in the same way must have been illegal.

" IT has been said by the advocates of counsel for the respondents, that this seizure is analogous to the seizure of prize by non-commissioned captors; which prizes vest, as droits or perquisites of admiralty as they are called, in the crown; and any person in war may take for the king. But on this it must be observed, that in such captures the parties seize at their peril, and so they do in cases of revenue. In the first, if they fall into the hands of a foreign power, not having a commission from their own prince, they may be tried, condemned and hanged as pirates; and in the latter case, if resistance should happen, and death should follow,

the

the consequences would be fatal to the non-commissioned seizer. This was a point which the court recommended to the advocates to consider.

"AN argument is taken on the other side, that a surveyor-general assuming to himself, by the force of his own authority, the appointment of any person to act as collector of the customs in the place of a collector who is absent, and which collector was appointed by the commissioners in England, is an attack upon the patronage of the commissioners not to be allowed, although it is said to have been the practice. This is doubtless a consideration for the boards of customs and treasury, and seems to be both impolitic in every view, not only of ministerial patronage and influence, but of the proper checks and controul of the machine, and likely to occasion confederacy and fraud in the officer, as well as oppression to the merchant.

"THE policy of suffering that which the surveyor-general in his affidavit says, has been long the usage in the colonies, is no consideration here; but it should seem as if this seizure, so far as the question of authority to seize goes, was well enough made.

"BUT who are these commissioners of the customs?"

"THEY are the commissioners of commissioners.

"THE office of lord high treasurer (now put into commission) springs out of the prerogative of the crown. Its business is the collection of the revenue of the crown.

The commissioners of the customs are functioned as existing by the act of trade and navigation, just as the commissioners of taxes, an office never heard of till a few years ago, are mentioned by several late acts of revenue.

"BY the act of the 25th of Charles II. c. 7. sect. 3. for the encouragement of the Greenland and Eastland trades, it is enacted, that the whole business shall be ordered and managed, and the several duties hereby imposed shall be caused to be levied, by the commissioners of the customs in England now and for the time being, by and under the authority

authority and directions of the lord treasurer of England, or commissioners of the treasury for the time being. 43

“ THE power of making seizures by the commissioners of the customs, is restrained by the 13th and 14th Charles II. c. 11. sect. 15. No ship or goods shall be seized or forfeited by reason of any unlawful importation or exportation into or out of this kingdom of England, dominion of Wales, or port or town of Berwick, or for not payment of any customs, but by the person or persons who are shall be appointed by his majesty to manage his customs, or officers of his majesty's customs for the time being, or such other person or persons as shall be deputed and authorised thereunto by warrant from the lord treasurer or under treasurer, or by special commission from his majesty, under the great or privy seal; and if any seizure shall hereafter be made by any other person or persons whatsoever, for any of the causes aforesaid, such seizure shall be void and of none effect. Sect. 16. allows the officers of the customs, their deputies and servants, or any others acting in aid of them, to plead the general issue to actions, &c.

• “ AFTER all it must be observed, that it appears a little singular, that mr. Joseph Keeling, the actual collector, who in his affidavit says, that he himself had his authority from the board of customs in England, calls this acting *for* him “*an attempt*” not authorised by him; and it does not appear whether he was absent out of the island at the time of this seizure. He might possibly have been in 't, for his affidavit bears date at Barbadoes, 16th of October, 1787. 44

“ So the seizure looks as if to have been concerted by the surveyor-general, mr. William Stenhouse, and his instrument, Samuel Dearsley.

“ THE governor too must have had his share in it; for it appears in evidence, that soldiers, artillery-men from the fort, were put on board to help seize and keep possession of the ship, which could not have been done without the orders or sanction of the governor.

“ HOW-

" HOWEVER, the act of the 13th and 14th of Charles II. sect. 30, gives authority to the officers of the revenue to call in assistance as follows :

" ALL officers belonging to the admiralty, captains and commanders of ships, forts, castles and block-houses ; all justices of the peace, mayors, sheriffs, bailiffs, constables, and headboroughs ; and all the king's officers, ministers, and subjects whatsoever, whom it may concern, are directed to be aiding and assisting to all persons appointed by his majesty to manage his customs, and the officers of his majesty's customs and their respective deputies. They are to be saved harmless by this act. But by sect. 23, all deputies, clerks and servants must have taken an oath for the faithful execution of their duty, power being reserved to the commissioners and principal officers of the port of London and all other out-ports to administer such oaths.

" THE ship and cargo therefore, having been seized by the assistant to the collector, the great question is, Whether there was an importation contrary to the statute, with an intention to defraud his majesty's revenue ?

" Now it was asked what importation is ! Definitions of words are dangerous, and always inadequate. As one of the advocates for the seizers, dr. Lawrence, says, it is not necessary to be learned in etymology, whether the word importation comes from *porta* or *portus*, or *porto*, *portas*, *portavi* ; nor is it necessary to consider whether a bay is a port ; whether a port must be *infra corpus comitatûs*, within two projecting and embracing points of land ; and whether Carlisle Bay is a member of the port of Bridge-town ; and for this purpose to rummage ancient grants, maps, and charters.

" CARLISLE Bay is a road for shipping ; and I believe there is no harbour or port, strictly speaking, at Barbadoes ; but ships must come to an anchor in this Bay, in order to unload for Bridge-town.

" THE

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“ THE best way of fixing the meaning of all words, is to take it from the context of every book, and of every act of parliament.

“ THUS the act of the 27th of the king, after the word *importing* adds *bringing in*; so that importation, whether by land or sea, must mean a *bringing in*; and that *in* must infer a landing and bringing in goods, so as to be in the way of sale or barter, and with such intention: for it is clear from that which passes daily in the port of London, in the cases of carrier-ships, that the bringing goods into port merely, is not an importation which necessarily incurs forfeiture; and if it did, general ships on freight must never come there bound from ports of France and elsewhere to London, from thence to Amsterdam, from thence to Hapbuigh, from thence to Peterburgh, and elsewhere in the North Seas. Some goods are for one place, some for another: only the contraband articles must be reported, and bond given not to run them.

“ THERE is no more intention in such a case to defraud, than there is in the driver of a broad wheel waggon to defraud the turnpikes and inns, when in a journey from York to London he drops the several parcels at the several places on the road to which they are directed.

“ So far from having an intention to defraud the revenue on the part of the master, it seems rather that the SEIZURE was fraudulent! The officer declares at all events he will not lose his fees; and it appears that he actually ran before-hand, by preventing a *report being made* till after seizure; for it is actually in evidence, that the ship was seized by Dearsley before she could come to an anchor and dress her sails. And to make the seizure the surer, all sailing away to a foreign port was precluded by taking possession, and with a guard of soldiers, artillerymen from the fort, with musquets loaded and bayonets fixed; an act in which the governor undoubtedly must have been especially concerned.

“ IF

## IN THE COURT OF ADMIRALTY.

" If the master had had any idea of confiscation, he would have taken captain Barnes, of his majesty's frigate, at his word, who gave him notice of the intended seizure, and the master might have stood out to sea again. But the governor, the surveyor-general, and his under agent were apprized beforehand; and when the bird which was expected was got into the net, they would not let it out again: fees and forfeiture were the word, and they felt bold in imagination.

" THE ground therefore of *not reporting* in the information is clearly not sustainable. But " the cargo of planks, " &c. exceeding the quantity reported after the seizure, " is said not to have been truly reported." In answer to this it is said by the counsel for the appellant, that the master could not mean to defraud, because lumber was not liable to any duty or prohibition at the time when it was laden; that it was natural and right that the report of the master should be exactly correspondent with his invoice; that some of the planks being deficient in their quality, and some of them full of shakes or splittings, the supernumerary planks were an allowance made by the seller to the buyer. Besides this, it may be observed, what I have learnt to be the universal practice in the trade of wood or timber (and it is certainly so as to the ships which come to England from Norway with fir timbers and planks), that there is what is called the captain's privilege; a certain quantity of spars and planks, which are placed on the sides, decks, and elsewhere among the rigging of the ship, which pay no duty, and are never noticed.

" NEXT comes the consideration of the 23, 24, or 25 dozen of French wine in bottles, and the several casks of Madeira.

" WAS this bad French wine infectious in law, and to furnish reason for the general confiscation of both ship and cargo?

" THE



CASE OF THE SHIP COLUMBUS,

" THE Madeira was certainly allowable, being brought directly from Madeira.

" HAD the continuity of the voyage been broken by landing the wine at Tobago, it might have been some argument, so far as suspicion goes, to justify a seizure, that it was a barter, and was actually taken on board from a French port, after having paid the French duties; but even if landed, if it were on account of a leakage or the like distress, the hurthen of that proof being cleared by the master, it would work no confiscation.

" A PRINTED paper was ushered in with great solemnity by the king's advocate. It was announced to have been settled upon such great authorities of law as this court *must respect*. And now it turns out to be a paper, like many others, whose respectable authority is only that of the great oracles and leaders of most boards, the solicitors; who report, who give opinions in law and in fact, who solicit, who prosecute, who often, I believe, do many things without consulting the king's advocate, the king's attorney, the king's solicitor general; and which may have been so in this case; for the question was put by the court, to which no answer was given.

" A WARRANT, an instruction will not make law, if the act of parliament does not. I have seen, many years ago, a warrant from a board returned by an advocate-general, as erroneous, irregular, and illegal. I have seen instructions from a board to their officers inconsistent with the act of parliament which was to be carried into execution.

" As if it were the part of a good judge, in matters of finance, *ampliare jurisdictionem*, and to extend penalties by construction, I have heard an argument in the course of this cause, that *breaches of penal statutes may be by construction*; and I never desire to hear that argument again while I sit in this chair.

" ONE

IN THE COURT OF ADMIRALTY.

" ONE need only to read the printed instruction March 1787, to see that if it were ever so well founded, it does not apply to this case.

No.

*Custom-House, London,*  
*March 1787.*

" GENTLEMEN,

" IT appearing to have been the practice at several of the ports in America to permit the importation of Madeira wines, *not directly* from the island of Madeira, on payment of the duty of seven pounds per ton, laid by the 1st sect. in the act of the 4th of Geo. III. chap. 15:—

" As Madeira wine can only be legally imported into America, either from Great Britain, Ireland, or *directly* from Madeira, or from one British plantation to another where it had been first legally imported, you are therefore in future not to suffer any Madeira wines to be landed at your port, except under the foregoing circumstance. Collector and Comptroller."

" NEITHER the statute, nor the instruction, nor any interpretation could ever mean, that a ship coming from Madeira with wine, should put into no other port in the intermediate voyage until she shall arrive at her last port of destination.

" BUT the twenty-five dozen of French wine (the Madeira wine put out of the question), it is said is a good ground for seizure. It really does not deserve a moment's consideration. It is impossible for either the court, or the or audience, to be serious upon it.

" WHETHER the wine was charged or chargeable to his owner's account current, or to his own separate one, it is immaterial. The master takes it on barter for a part of his cargo, from a French ship in the harbour of Tobago; he

he knocks the cases to pieces; the ship's cook boils his kettle with them; he puts the bottles of French wine into the lockers of his cabin, with bottles of porter, &c. and he says that they were for stores; that he expected to carry passengers from Barbadoes to Europe; and this wine was intended for their use, and the entertainment of some friends occasionally of the king's navy, in which he had served himself.

"It is well known that in the East and West Indies no wine will keep but Madeira and French wines, consequently none other are used: they are as necessary on board ships in those climates under the head of providing liquor, as in the North Seas they would provide small-beer or strong. The quantity was too small for an importation, and too small even for entertainment for a voyage of the length from Barbadoes to England.

"Suppose the master had said it was intended not only to entertain the planters, when they came on board, from whom he was to procure freights, but to entertain the governor; and suppose we add the surveyor general and the officers of the custom-house to the company, how long might such a batch of thin, or even strongest claret be supposed to last, in a climate where the human blood boils over, and in a red-hot atmosphere wants perpetual recruit?

"The advocates on all sides have indulged a vein of wit and humour, necessary to enliven the tediousness of a hearing of four days, and a dull detail of facts. Without imputation of levity, the court in its turn may be permitted to ask (in answer to the arguments of quantity and excess of stores) the learned doctor, the king's advocate, in his experience as a professor at the university of Oxford, and we will not even leave Cambridge out, how long twenty-five dozen of claret would last the fellows of ALL SOULS, or any other college in either university, their exceedings at Christmas? It is pretty clear that neither the governor, nor the surveyor general, nor acting collector, found this claret to be good,  
for

for they would neither allow him time to report it, nor to drink it out.

“ THE act of the 26th of the king, c. '59, sect. 7, has allotted by way of stores only two gallons of wine *per* man; and these being imported are exempted from forfeiture, provided there are no spirituous liquors on board at the time. But this limitation only relates to the quantity remaining at the end of the voyage upon importation into Great Britain, the ports, harbours, havens, and creeks thereof; to which only this clause of the act refers, and not to the plantations.

“ THE argument, that the Columbus was employed in the course of an illegal trade, as a masked ship, in contravention of the laws of France, is an argument which does not apply to the case here.

“ THE masquerader had a right to have worn the mask, if he could have obtained the ticket; but the fact never happened. At all events this carrier-ship went out on speculation to obtain freights.—“ If the permission of the French Governor at Tobago could have been obtained, it is said that there would have been an ostensible French captain. The crew were already Jersey men, speaking the French language; and the ship then would have sailed directly for Bourdeaux.” But it then never would have touched at Barbadoes, to be made a seizure.—But that commission was refused, and so the fact of going to France never took place, if it had been ever so criminal. But where would have been the criminality against the laws of England and its revenues, if the ships of British subjects were to become carriers to France? Whose maritime equipments would be decreased by that means?—Answer, Those of France.—Whose would be augmented?—Answer, Those of England.

“ Is it not well known in the commercial world, that the carrier and commission trades are exceedingly great objects, and sought for by a most ambitious rivalry; and that the carrying the goods of the other maritime powers, a business which Holland is losing, which Sweden is gaining, and

Great Britain is availing itself of more and more every day, is a consummation devoutly to be wished?

“BUT this, a learned advocate says, is above the dignity of a great mercantile conduct, in an alderman, a director, and a member of the British senate, to deal in herrings, to buy them cheap at Gottenburgh rather than at Yarmouth, to sell them dear at Tobago, and to run about the world picking up freights, and the like. Mr. Le Mesurier is represented as a Proteus, a perfect Harlequin in commerce. It would be well for this country if there were many such Harlequins: it is from small profits that great ones are accumulated. That industry which raised up the Dutch States, and every other commercial nation, by turning the most minute articles to account, is the honour and profit of the merchant, and forms, from united although small fibres, the sinews of every great commercial kingdom; they make the arm of war, and the ornaments of peace.

“THE learned advocate, who has made pretty free with merchants, as if they were all smugglers; who would have perhaps said, that bills have sometimes been smuggled into former parliaments (if it had suited his purpose); and who has launched out into mischievous sallies of personality on his friend Mr. Le Mesurier, as he calls him, has been indulged by the court in this first trial of his shining abilities at this bar, where it is the honour and the practice that no personalities are, in general, allowed.

“HOWEVER, there is one argument which affects Mr. Le Mesurier and the mercantile world, and the constitution of the laws of this country, which merits notice from this court; and the more so, as the argument has been getting into fashion, from a *dictum* of a very venerable character, which turns out only a quotation of a writer not possessing or deserving of celebrity—the *evasion* of the laws! The law of England knows not of any such thing. The law cannot be evaded. The law exists, or does not exist. The case that is not within the law is no evasion. It stands

stands substantially clear, and every man is justified in this war of private property and public revenue, in this collision of interests, of attack and defence of the property of the subject, and free intercourse of commerce, when a man can so conduct his mode of trade, or private æconomical life, that he shall not come within the *casus* of prohibition or imposition.

“ IF an act of parliament is not comprehensive, and none can be universally so, who shall dare to say, “ I will strain the net to catch the bird which flies free from its penalties.” Good God! what would be the consequences to this country of such a doctrine of *evasion*, but something I will not name! The history of this argument of evading law is curious.

“ WHEN the bill to prevent clandestine marriages became a law, and its oversights and omissions were discovered, the marriages in Scotland became a subject of contest.

“ AS the bill was introduced into parliament to compliment a minister, to answer the views of a particular family and aristocratical principles (as it was said by those great men who opposed the bill), so the doctrine of *evasion* was introduced by counsel employed against the validity of these marriages in compliment of the drawer of the bill, to make up for the defects. But the argument has since been ousted in all such cases of marriage, upon solemn determinations in their favour: yet it has still left its tail behind it: and as bills are presented every day to pass the legislature, not the work of the greatest men, and of the clearest heads living, so the evasion of the law is still a favourite argument with some people: but it deserves its fate.

“ IN rummaging the immense piles of foreign learning, and those of Dutch and German schools, published by every graduate on his proceeding to an academical degree, containing all the reading never to be read, a passage was found in the *Prælectiones* of Huberus, a Dutch schoolmaster, or, in other words, a professor of a foreign University.

“ HE says, that “ the legality of an act done in a foreign country makes, by the general law of nations, and the practice of Europe, an act legal in the proper country of the parties, although it would have been illegal *in foro domestico*, if the thing done had been transacted at home. Thus (says he) a party not being of full age and capable of contracting marriage until twenty-five years old, in the province (I think it is) of Overijssel, leaps over a dyke into the province of ———, where a party is of age at twenty-one, and there solemnizes marriage, and returns back, then such marriage is held good by the law of Overijssel; which (says the learned professor) is very impolitic and ill-judged, because it is dishonourable for any government to give a sanction against itself to the laws of any other country; for that is *in fraudem legis*, a defrauding its own law; and though this act is valid, yet (says the *rector magnificus*) in MY opinion it ought not to be.”

“ DID not the good man see that there is no *fraus legis*, no evasion, no defrauding the law of Overijssel by this act, but that the law of Overijssel is so—If you stay at home, you shall conform to the ancient laws and customs at home; but if you will take the trouble to skip over the next ditch, you shall have the benefit of the leap for your matrimony, and our law on your return holds it valid. Why? Because as a trading, free, and enlightened nation, we know that every marriage is a gain to the state and to true religion, in spite of obsolete laws and restraints, invented by priests for the trade of indigencies, and encouragement of luxury and penance.

“ THE only answer to the opinion is, The decision is worthy of the professor.—I will say no more than that this narrow-minded ridiculous speculation is written in the worst Latin that ever was read, and published on the worst paper that ever was printed.

“ THE laws are awake to those who watch, but not to “ those who sleep,” is a rule applied by the counsel for the respondents

respondents to the appellant: Mr. Le Mcfurier knew of this bill in parliament; it was there strenuously debated, opposed and defended: he might have wrote to this man, to that man, to the master of his ship, sailing about the appellant, knew not where.

“THE moment the act being passed was known in the British Islands, all was in a ferment. The ship-owners, the merchants, the planters were alarmed. How were sugars to find hogheads, how find their way to Great Britain? Were all remittances to the owners of estates in the plantations to be suspended, and the duties to government upon those sugars, for want of lumber, and pipe-staves, and shipping?

“MR. WALLIS did all he could: he applied to the governor; and (so far from intending to defraud) by his innocent and preventive declaration that this ship was expected, he gave occasion to a rapid seizure the moment she arrived.

“THE governor is prayed to exercise his suspending power. He refuses—yet at the same moment the committee of council here had reported upon the emergency from a want of shipping, &c.; and the secretary of state, in haste to obviate the mischiefs, without waiting for the report begetting an order of council, had acted upon the authority of the report, and issued his instructions to the governor.

“FROM whom could the committee of council, from whom could the secretary of state have assumed such a fact as the existence of a pressing emergency, but from the previous correspondence of the governor himself?

“THE governor pending the suit announces in his proclamation the emergency and instructions of the secretary of state,

“WHEN he is petitioned by Wallis, before the arrival, he denounces against a suspension upon an emergency of



which he must have already informed government, and after the seizure he refuses to hear any petition from the master or Wallis. This is, to be sure, imperial enough. The secretary chafes them from the door of the governor's house; he bids the man be gone to the custom-house.

"THE collector will not lose his fees, nor the surveyor-general nor governor his forfeiture. It would be the only one, under this act, that they were likely ever to get.

"THOUGH the proclamation issues, it shall have no retrospect. The cause goes on: the attorney and solicitor-general of the island too will not lose their fees; there is no *noli prosequi*, no attention to reports of the committee of council, nor to his majesty's instructions signified to the governor, and by him published to the whole island; but long afterwards, on the 17th of November the cause is heard, and the judge of the island pronounces forfeiture of both ship and cargo. The decree is curious. He talks of the *sacred rights of his majesty* himself, and falls into the error of conceiving his majesty to be personally concerned, and lays a great stress upon it; but he should be taught to know, that *whosoever brings his majesty, as an individual, personally forward in such business, is a bad friend, a bad lawyer, and a worse subject.*

"SUCH is the consequence of giving the third of forfeitures to governors; such is the spirit of governments often in the hands of military men, remote from the administration of the laws at home; and such the dangerous affectation of superior commercial and political talents in regulating every thing till every thing shall become *irregular*; and so at last there may be left no trade and no revenue to regulate.

"AT the outset of hearing this cause, the court thought it necessary to be informed if there had been any order of council, and stopped the farther hearing until information on that fact might be had, as the sure way to enforce that information.

"THE

"THE appellant (mr. Le Mesurier) in court said, he had applied to government, but in vain, and could get no answer.

"NOT in the least doubting the good sense, rectitude, and justice, so often experienced from those persons who, either as principals or subalterns in office, conduct at all times the business of his majesty and the kingdom, it did not seem necessary for the court to make any peremptory or personal order judicially: but it was supposed that mr. Le Mesurier had applied improperly; and it was recommended to him to represent the necessity of this information, for the high purposes of public justice, and to learn whether and when any order of council had been made for dispensing with the act of the 27th of his majesty.

"AFTER waiting, an affidavit is now produced, dated 21st of Nov. 1789, made by mr. Paul Le Mesurier and mr. Allgood William Wallis. Mr. Le Mesurier swore, that on the 13th of Nov. last, mr. Le Mesurier applied to mr. Fawkener, one of the clerks of the privy council, to obtain a copy of the order of council which was understood to have passed in May 1787, concerning the suspension of the act of the 27th of his present majesty, chap. the 7th; and was then informed that no order of council did pass, but that the committee of council for the affairs of trade made a report to his majesty recommending such suspension; a copy of which report he would endeavour to procure for the deponent: that on the same day he did apply to Scrope Bernard, doctor of laws, under-secretary of the home department, (mr. secretary Grenville not being then at his office), for a copy of the secretary of state's letter to the governor of Barbadoes, dated 25th of May 1787, conveying his majesty's pleasure touching the said act, who then promised to lay his request before mr. secretary Grenville: that on the 13th inst. he again applied to mr. Fawkener and mr. Scrope Bernard, and was informed by

mr. Fawkener that he had laid his request before lord Hawkesbury, president of his majesty's committee of council for the affairs of trade, but that lord Hawkesbury did not think it proper to grant a copy of the report, as it was not an order of council, but a representation of the committee to his majesty; and referred him to the secretary of state for a copy of the dispatches that were sent in consequence of the said representation; when he accordingly applied, but was informed by the said Scrope Bernard, that mr. secretary Grenville had taken his request into consideration, and had given for answer, that the letter dated 25th of May 1787, was a paper of which no copy could be granted: and therefore this deponent has not been able, for the reason aforesaid, to obtain either of the said papers; and farther deposed, that on the 15th of June last he was shewn, at the secretary of state's office, a copy of a letter signifying his majesty's pleasure concerning the suspension of the said act, and which he believes to have formed the part of the dispatches to the governor of Barbadoes referred to in his proclamation of the 15th of July 1787; and said, that the said letter was dated the 25th of May 1787. And the said Allgood William Wallis deposed, that he was at Barbadoes at the time of the seizure of the said ship Columbus, and for a considerable time before: that the said act of parliament of the 27th of his present majesty, chap. the 7th, was not made known to the inhabitants of Barbadoes till the 23d day of May 1787: that he the deponent did soon after, viz. on the 24th, deliver the petition stated in the process to William Southwell, private secretary of the governor of Barbadoes, in order to be presented to him, praying him to admit the ship to an entry, and of which application he informed mr. Paul Le Mesurier by letter, dated 27th of the said month; but to the said application to the governor, he did not receive any answer till the 29th of the said month of May.

“ THE

“ THE observations which occur upon the facts stated in this affidavit are as follow :

“ THE court doubtless might have a fuller information, if it were to change its recommendation to the appellant into an order upon the respondents, who must lose their cause, if it were upon no other ground than not producing public documents as required; but there is enough in the affidavit to confirm the court in its opinion, and to make any farther and peremptory order unnecessary.

“ IT is said by the advocates for the respondents, that it appears from this affidavit of Mr. Le Mesurier himself, that there was *no* order of council; but that there was *no* order does not so appear. It appears that there was a report of the committee<sup>1</sup> and it wants no argument to prove what lord Hawkesbury said, “ that *the report of which* “ he refused a copy, as president of the committee of council, was not an order of council.” Mr. Le Mesurier, it should seem, therefore, should have applied to the lord president of council; but lord Hawkesbury refers him, for a copy of the dispatches, to the secretary of state.

“ Now upon this the court is unwilling to suppose that his majesty's business, and of the nation, is transacted in so unconstitutional a manner, as that a report of a committee, and of the particular president of that committee is sufficient, without a first president of council, and an order of council, for a secretary of state to act upon, especially when a law of penalty is to be dispensed with; and therefore the court put the question to the king's advocate, who was arguing at the outset that there was *no* order of council, how that appeared; and whether it would not be an improper and dangerous presumption to the discredit and prejudice of government to adopt. But I am more inclined to *presume*, that there was such a report, and that the dispatches followed upon it; and that there was, what certainly there ought to be, an order of council following the report; unless one can suppose one  
president

president to be equal to two, and a part equal to the whole; which would be a solecism inadmissible in government, and every where else; and as such, in consequence of the above question from the court, the argument has not been pressed on the side of the crown.

"WE all know, or ought to know, and no persons know it better than the king's advocate and the other law officers of the crown, that by the constitution of this country the whole executive government of it is in office. The king is omnipresent (every where present); he is in his privy council, in his high court of parliament, in his office of treasury, in his office of admiralty, in his office of justice, in his ecclesiastical courts, in which last his name ought to be used, but is always understood and would have been so used, if the reformation had been completed as it was intended.

"IT is this principle of office in the constitution which happily guards the individual person of the sovereign from doing wrong; and fixes all responsibility upon the official servants of the crown and people. It is this principle which both limits and upholds monarchy. The columns, which are placed in a circle, and are the boundaries of the august fabric, are at the same time the supporters of it."

"EVERY sound lawyer in England knows, and every well-educated man knows (for no man can be said to be well-educated who is not acquainted with the principle of the constitution under which he lives) that there is a comity, a legal politeness, a correspondence between all courts in reciprocity, not only in this country, but also between them and foreign judicatures. There would have been no difficulty in this court in writing, if it had been necessary to make such application, to the lord president of council, to have been informed of a fact. Most probably the president of the committee of council, lord Hawkesbury, from a principle of extreme caution, judged, that in that report which was made, there were matters included foreign to the question depending here; or that it might

might not be prudent to publish the want of British shipping, the several emergencies of our plantations at the instant, and the state of their trade, and the embarrassments of government respecting the shipping of the American United States; and therefore his lordship referred the appellant for satisfaction elsewhere.

“ To the lord president of council it should have seemed most proper; but, however, his lordship shifted the application to the secretary of state.

“ A SECRETARY of state would have trembled at the idea of exercising any powers dispensing with the established laws of parliament, without the sanction of an order of council to lead his dispatches, if the law to be dispensed with, and which positively enacts an order of the king in council, or an order of the governor in council, had been to be dispensed with, to the prejudice of the merchant and subject: which was not the case here; for this dispensation was to be for *the benefit of the merchant and subject*; and for what appears to the contrary in this affidavit, it may be presumed that there was an order of council; and it is needless to consider whether the lord president of the council was actually present *for such a purpose*.

“ THE difficulty Mr. Le Mesurier has experienced in obtaining information, must be placed to some awkwardness in his own mode of application; for as it cannot be supposed for a moment, that bills are framed and passed into acts designedly to entrap both the merchants and the officers of revenue; so it cannot be supposed that it is laid down as a principle in the trial of experimental laws of trade, that his majesty's government should make a show of supporting all the officers of revenue and governors of distant plantations *at all events, and in every instance of seizing*. It is necessary, doubtless, in general, that they should be supported; otherwise the revenue would not be watched as it ought to be, and there would be no activity in counteracting the perpetual subterfuges of the illicit trader. Officers, who act fairly and diligently

to the best of their understanding, ought not to be left without the protection of government; although in former reigns, and under former administrations, many acts of rapacity and oppression may have been supported by the public purse of the treasury. Like captors of prize acting under the king's commission, officers of revenue seize at their own risk: and this brings us to the consideration of costs.

"IN the case of Lady Dorothy Windfor, where the nominee of the crown was applying for administration of her effects, as dead intestate, and putting the persons claiming as next of kin to plea and proofs of their pedigree, Sir George Hay said, "though no costs could be given against the crown, yet the nominee might be subject to costs."

"Now, in this action of *qui tam*, a process in its form not proper to the admiralty court, but introduced by the common lawyers in the vice-admiralty courts, the informants prosecute for themselves as well as for the king; and although the act for the condemnation of prizes so perfectly vests the prize in the captors, the owners, commanders, and crew of private ships of war, as that the process is in their own names, and (very unadvisedly by the first makers of those acts) is not in the crown; yet as the king's advocate has laid it down, that the governor and seizers of goods imported contrary to the acts of trade, are all subject to the board of revenue, so the treasury board can remit or compound for duties, notwithstanding the interest of the seizers."

"THE attorney-general, when there appears a penalty to have been incurred without any *intention* to defraud, may enter a *noli prosequi*, under the particular clause of the 26th Geo. 2. c. 59, sect. 62, 63, which clause I take to be no new power, but only declarative of the old power of the law officers of the crown. The king's prime serjeant, the advocate, attorney, and solicitor general have  
always

always had this power; and whatever the common-law officers can do in their courts, there is no doubt but the advocate-general can do here; and it is notorious, that the board of treasury and lord treasurer have always exercised a power of remitting forfeitures, notwithstanding the *interest* of the individual seizors under any act of parliament.

"It is admitted by the king's advocate, that the interest of the seizors must follow that of the crown; and that *is not* an independent right, although they seem by their conduct to suppose it is."

"If the law officers of the crown, who are always men of learned education and of great abilities, were more consulted in regard to all bills relating to maritime affairs, his majesty's service would certainly be promoted; but from the neglect of the solicitors of boards, their clerks who draw the bills, and from other causes, the proper and professional people of rank seem to be forgot, and the civilians in particular to resemble *toti divites orbe Britannos*.

"THERE is a marked spirit, as I observed before, in this cause; and if it were not for its being the first of the kind heard, and that many other causes of the same sort are waiting the event of this suit, and that the granting to mr. Le Mesurier his costs against the governor and collector, the respondents, would possibly encourage an appeal, and delay the restitution, I should feel an inclination to give costs. The conduct of the governor, the surveyor general, and acting collector, the judge, and the law officers of the crown at Barbadoes, merits a severe censure."

"THERE was time enough after the proclamation dated the 15th of July 1787, which must have immediately followed the dispatches of lord Sidney, to have stopped the prosecution; for sentence of condemnation was not pronounced till the 17th of November following: but in spite of the king's instructions, a condemnation they were resolved



solved to have : like the country-fellow who went to the post-office to enquire after letters for his master; but none being so directed, he stole a letter, although directed to another person, because, he said, his Honour expected and ought to have one.

“ IT is remarkable that captain Barnes of his majesty’s frigate, instead of seizing, acquainted captain Guerin of his danger; and that upon Guerin going to the custom-house, Dearsley having asked the question, and finding that captain Barnes had been on board but had not seized, declared then he would go and seize, that if any thing were to be got by it, they might not lose their fees : the comptroller agreeing with him, he went accordingly.

“ IF it would have been wise in mr. Wallis upon principles of prudence, and knowing beforehand the governor’s resolution of not permitting an entry, to have relied less upon the opinion of captain Barnes, and upon a report current that the vessel was gone to St. Vincent, but to have sent out another vessel to cruize off Carlisle Bay, and prevent his coming in; so it would have been an act of candour and justice in the governor, if he had said to mr. Wallis upon the first application,

“ THE law of the 27th of the king is against you. It  
“ is true, that with the advice of my council, I can by a  
“ particular clause of the act, upon an emergency, dispense  
“ with the prohibition.

“ WE do not care to take the judgment of that emergency upon ourselves, though we pretty well know the  
“ necessity of the colony : and if we allow entry to one  
“ ship so circumstanced as yours is, we must allow it  
“ to all.

“ THE exercise of every dispensing power is upon tender ground, both in law and in policy. The king’s  
“ government are already apprized of the emergency of the  
“ difficulties which the plantations labour under for want  
“ of lumber and scarcity of shipping; it will not be long

“ before

“ before I shall receive my instructions. Let the king and council at home dispense, then shall I be free from blame. Therefore either let your ship go away, as soon as she arrives, to some other place in search of freights; or if it should be necessary that she should come to an anchor, make your entry, and give security not to unload, or to lodge in the king’s ware-houses, and to re-export what ever is prohibitable.”

“ As the governor was coming away, his conduct should have been the more delicate, when his own emolument was so notoriously concerned.

“ BUT what was the governor’s conduct upon the second application, after the ship was arrived! No sooner was the ship seized, than captain Guerin came instantly on shore, and in company with the agent, mr. Wallis, went to the government-house with an intention of acquainting the governor with the circumstances attending the ship; that the deponent was ignorant of the act of parliament; and to request that if the ship could not be permitted to an entry, she might be permitted to sail to some neutral port.” A message was sent by mr. Wallis to that effect. They were refused access.

“ THE answer brought was, that the governor would not see Wallis, or any body belonging to the Columbus, or any such person. The message and answer was sent and received by mr. Southwell, the private secretary of the governor.

“ THEY made another effort to persuade the secretary to deliver another message. This he refused; and gave as a reason for his refusal, that he had received orders from the governor not to bring any more messages to him from any person concerned with the Columbus.

“ THIS deposition of Guerin, examined upon interrogatories by the respondents, is not contradicted by Southwell.

“ IT

CASE OF THE SHIP COLUMBUS, &c.

" IT should be a lesson to mr. Parry, and to all governors of British colonies and settlements, that it is the right of the subject to petition, and the duty of all judging and governing powers to hear, or the consequences are or may be experienced.

" UPON the whole of this matter, in giving force to the intervention of the dispatches of the secretary of state, and the report of the committee of council, I WILL DO THAT FOR HIS MAJESTY'S GOVERNMENT WHICH HIS MAJESTY'S GOVERNMENT AT HOME WOULD HAVE DONE FOR THEMSELVES; considering that such instructions were a sufficient dispensation by the crown against the crown itself, which by its own acts can release a debt, as well as a private man can release a debt or declare a trust for the relief of the subject; that the report, dispatches, and proclamation, intervening *by mere sentence*, have both a retrospective and prospective, and absolute effect; and farther, because it is clear, that in this case there was *not an importation within the acts of trade with a view to defraud his majesty's revenue.*"

## No. V\*.

*The DUKE of NEWCASTLE'S LETTER, by his MAJESTY'S ORDER, to MONSIEUR MICHELL, the KING of PRUSSIA'S SECRETARY of the EMBASSY, in ANSWER to the MEMORIAL, and other PAPERS, delivered by MONSIEUR MICHELL to the DUKE of NEWCASTLE on the 23d of NOVEMBER and 13th of DECEMBER 1752.*

S I R,

Whitehall, Feb. 8, 1753.

I LOST no time in laying before the king the memorial which you delivered to me on the 23d of November last, with the papers that accompanied it.

HIS majesty found the contents of it so extraordinary, that he would not return an answer to it, or take any resolution upon it, till he had caused both the memorial and the *Exposition des Motifs*, &c. which you put into my hands soon after by way of justification of what had passed at Berlin, to be maturely considered; and till his majesty should thereby be enabled to set the proceedings of the courts of admiralty here in their true light; to the end that his Prussian majesty, and the whole world, might be rightly informed of the regularity of their conduct; in which they appear to have followed the only method which has ever been practised by nations where disputes of this nature could happen; and strictly have conformed themselves to the law of nations, universally allowed to be the

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\* The ensuing Paper contains a thorough investigation and justification of the principles adhered to by the Court of Admiralty in England, in cases of capture of the ships and property of neutral powers in time of war. It was composed on a memorable occasion by the united abilities of the great law officers at that time in the service of the crown, and has ever since been received as the standard of authority in cases of that nature.

only rule, in such cases, when there is nothing stipulated to the contrary by particular treaties between the parties concerned. This examination, and the full knowledge of the facts resulting from it, will shew so clearly the irregularity of the proceedings of those persons to whom this affair was referred at Berlin, that it is not doubted, from his Prussian majesty's justice and discernment, but that he will be convinced thereof, and will revoke the detention of the sums assigned upon Silesia; the payment of which his Prussian majesty engaged to the empress queen to take upon himself, and of which the reimbursement was an express article in the treaties, by which the cession of that dutchy was made.

I THEREFORE have the king's orders to send you the report made to his majesty upon the papers above mentioned by sir George Lee, judge of the prerogative court; doctor Paul, his majesty's advocate general in the courts of civil law; sir Dudley Ryder, and mr. Murray, his majesty's attorney and solicitor general. This report is founded on the principles of the law of nations, received and acknowledged by authorities of the greatest weight in all countries; so that his majesty does not doubt but that it will have the effect desired.

THE points upon which this whole affair turns, and which are decisive, are,

FIRST, That affairs of this kind are, and can be, cognizable only in the courts belonging to that power where the seizure is made; and consequently that the erecting foreign courts or jurisdictions elsewhere, to take cognizance thereof, is contrary to the known practice of all nations in the like cases; and therefore a proceeding which none can admit.

SECONDLY, That those courts which are generally styled courts of admiralty, and which include both the inferior courts and the courts of appeal, always decide according to the universal law of nations only; except in those

those cases where there are particular treaties between the powers concerned, which have altered the dispositions of the law of nations, or deviate from them.

THIRDLY, That the decisions in the cases complained of appear, by the inclosed report, to have been made singly upon the rule prescribed by the law of nations; which rule is clearly established by the constant practice of other nations, and by the authority of the greatest men.

FOURTHLY, That, in the case in question, there cannot even be pretended to be any treaty that has altered this rule, or by virtue of which the parties could claim any privileges which the law of nations does not allow them.

FIFTHLY, That as, in the present case, no just grievance can be alledged, nor the least reason given for saying that justice has been denied when regularly demanded; and as, in most of the cases complained of, it was the complainants themselves who neglected the only proper means of procuring it; there cannot, consequently, be any just cause or foundation for reprisals.

SIXTHLY, That even though reprisals might be justified by the known and general rules of the law of nations, it appears by the report, and indeed from considerations which must occur to every body, that sums due to the king's subjects by the empress queen, and assigned by her upon Silesia, of which sums his Prussian majesty took upon himself the payment, both by the treaty of Breslau and by that of Dresden, in consideration of the cession of that country, and which, by virtue of that very cession, ought to have been fully and absolutely discharged in the year 1745, that is to say one year before any of the facts complained of did happen, could not, either in justice or reason, or according to what is the constant practice between all the most respectable powers, be seized or stopped by way of reprisals.

## DUKE OF NEWCASTLE'S ANSWER TO THE

THE several facts which are particularly mentioned above are so clearly stated and proved in the inclosed report, that I shall not repeat the particular reasons and authorities alledged in support of them, and in justification of the conduct and proceedings in question. The king is persuaded that these reasons will be sufficient also to determining the judgment of all impartial people in the present case.

IT is material to observe upon this subject, that this debt on Silesia was contracted by the late emperor Charles the sixth, who engaged not only to fulfil the conditions expressed in the contract, but even to give the creditors such further security as they might afterwards reasonably ask. This condition had been very ill performed by a transfer of the debt, which had put it in the power of a third person to seize and confiscate it.

You will not be surpris'd, sir, that in an affair which has so greatly alarmed the whole nation, who are entitled to that protection which his majesty cannot dispense with himself from granting, the king has taken time to have things examined to the bottom, and that his majesty finds himself obliged, by the facts, to adhere to the justice and legality of what has been done in his court, and not to admit the irregular proceedings which have been carried on elsewhere.

THE late war furnished many instances which ought to have convinced all Europe how scrupulously the courts here do justice upon such occasions. They did not even avail themselves of an open war to seize or detain the effects of the enemy, when it appeared that those effects were taken wrongfully before the war. This circumstance must do honour to their proceedings; and will, at the same time, shew, that it was as little necessary as proper to have recourse elsewhere to proceedings entirely new and unusual.

THE

THE king is fully persuaded that what has passed at Berlin has been occasioned, singly, by the ill-grounded informations which his Prussian majesty has received of these affairs; and does not at all doubt but that, when his Prussian majesty shall see them in their true light, his natural disposition to justice and equity will induce him immediately to rectify the steps which have been occasioned by those informations, and to complete the payment of the debt charged on the Duchy of Silesia, according to his engagements for that purpose. •

I am, with much consideration,

S I R,

Your most obedient, humble servant,

HOLLES NEWCASTLE.

*To the KING's MOST EXCELLENT MAJESTY:*

MAY IT PLEASE YOUR MAJESTY,

IN obedience to your majesty's commands, signified to us by his grace the duke of Newcastle, we have taken the memorial, sentence of the Prussian commissioners, and lists marked A. and B. which were delivered to his grace by monsieur Michell, the Prussian secretary here, on the 23d of November last; and also the printed *Explication des Motifs*, &c. which was delivered to his grace the 13th of December last, into our serious consideration; and we have directed the proper officer to search the registers of the court of admiralty, and inform us how the matter appeared from the proceedings there, in relation to the cases mentioned in the said lists A. and B. which he has accordingly done. •

AND your majesty having commanded us to report our opinion concerning the nature and regularity of the pro-



ceedings under the Prussian commission mentioned in the said memorial, and of the claim or demand pretended to be founded thereupon, and how far the same are consistent with, or contrary to, the law of nations, and any treaties subsisting between your majesty and the king of Prussia, the established rules of admiralty jurisdiction, and the laws of this kingdom;

FOR the greater perspicuity, we beg leave to submit our thoughts upon the whole matter in the following method:

1st, To state the clear established principles of law.

2dly, To state the fact.

3dly, To apply the law to the fact.

4thly, To observe upon the questions, rules and reasoning alledged in the said memorial, sentence of the Prussian commissioners, and *Exposition des Motifs*, &c. which carry appearances of objections to what we shall advance upon the former heads.

#### FIRST, as to the LAW.

WHEN two powers are at war, they have a right to make prizes of the ships, goods, and effects of each other upon the high seas: whatever is the property of the enemy may be acquired by capture at sea; but the property of a friend cannot be taken, provided he observed his neutrality.

HENCE the law of nations has established,

THAT the goods of an enemy on board the ship of a friend may be taken.

THAT the lawful goods of a friend on board the ship of an enemy ought to be restored.

THAT contraband goods going to the enemy, though the property of a friend, may be taken as prize, because supplying the enemy with what enables him better to carry on the war is a departure from neutrality.

BY the maritime law of nations universally and immemorially received, there is an established method of determination,

## PRUSSIAN MEMORIAL, CONCERNING NEUTRAL SHIPS.

termination, whether the capture be, or be not, lawful prize.

BEFORE the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding whereto both parties may be heard, and condemnation thereupon as prize in a court of admiralty, judging by the law of nations and treaties.

THE proper and regular court for these condemnations, is the court of that state to whom the captor belongs.

- THE evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken, viz. the papers on board, and the examination on oath of the master and other principal officers; for which purpose there are officers of admiralty in all the considerable sea-ports of every maritime power at war, to examine the captains and other principal officers of every ship brought in as prize, upon general and impartial interrogatories. If there do not appear from thence ground to condemn as enemy's property, or contraband goods going to the enemy, there must be an acquittal; unless from the aforesaid evidence the property shall appear so doubtful, that it is reasonable to go into the further proof thereof.

A CLAIM of ships or goods must be supported by the oath of somebody, at least as to belief.

THE law of nations requires good faith; therefore every ship must be provided with complete and genuine papers, and the master at least should be privy to the truth of the transaction.

To enforce these rules, if there be false or colourable papers, if any papers be thrown overboard, if the master and officers examined *in fraganti* grossly prevaricate, if proper ship's papers are not on board, or if the master and crew cannot say whether the ship or cargo be the property of a friend or enemy, the law of nations allows, according to the different degrees of misbehaviour or sus-

## DUKE OF NEWCASTLE'S ANSWER TO THE

picion arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received, by the claimant in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages; for which purpose all privateers are obliged to give security for their good behaviour; and this is referred to, and expressly stipulated by, many treaties\*.

THOUGH, from the ship's papers, and the preparatory examinations, the property do not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect: if he will not shew the property by sufficient affidavits to be neutral, it is presumed to belong to the enemy. Where the property appears from evidence not on board the ship, the captor is justified in bringing her in, and excused paying costs, because he is not in fault; or, according to the circumstances of the case, may be justly entitled to receive his costs.

IF the sentence of the court of admiralty is thought to be erroneous, there is in every maritime country a superior court of review, consisting of the most considerable persons, to which the parties, who think themselves aggrieved, may appeal; and this superior court judges by the same rule which governs the court of admiralty, *viz.* the law of nations, and the treaties subsisting with that neutral power whose subject is a party before them.

IF no appeal is offered, it is an acknowledgement of the justice of the sentence by the parties themselves, and conclusive.

\* Treaty between England and Holland, 17 Feb. 1668. Art. 13.—Treaty 1 Dec. 1674. Art. 10.—Treaty between England and France at St. Germain, 24th of Feb. 1677. Art. 10.—Treaty of Commerce at Ryſwick, Sept. 20, 1697, between France and Holland, A. t. 30.—Treaty of Commerce at Utrecht, 31 March 1713, between Great Britain and France, Art. 29.

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THIS manner of trial and adjudication is supported, alluded to, and enforced by many treaties\*.

IN this method all captures at sea were tried, during the last war, by Great Britain, France, and Spain, and submitted to by the neutral powers. In this method, by courts of admiralty acting according to the law of nations and particular treaties, all captures at sea have immemorially been judged of in every country of Europe. Any other method of trial would be manifestly unjust, absurd, and impracticable.

- THOUGH the law of nations be the general rule, yet it may, by mutual agreement between two powers, be varied or departed from; and where there is an alteration or exception introduced by particular treaties, that is the law between the parties to the treaty; and the law of nations

\* As appears with respect to courts of admiralty adjudging the prizes taken by those of their own nation, and with respect to the witnesses to be examined in those cases, from the following Treaties:—Treaty between England and Holland, 17 Feb. 1668. Art. 9 and 14.—Treaty 1 Dec. 1674. Art. 11.—Treaty 20th of April 1689. Art. 12, 13.—Treaty between England and Spain, 23 May 1667. Art. 23.—Treaty of Commerce at Ryswick, 20 Sept. 1697, between France and Holland. Art. 26 and 31.—Treaty between England and France, 3 Nov. 1675. Art. 17 and 18.—Treaty of Commerce between England and France at St. Germain's, 29 March 1632. Art. 5 and 6.—Treaty at St. Germain's, 24 Feb. 1677. Art. 7.—Treaty of Commerce between Great Britain and France, at Utrecht, 31 March 1713. Art. 26 and 30.—Treaty between England and Denmark, 29 Nov. 1669. Art. 23 and 34.—*Hennicus*, who was privy-councillor to the king of Prussia, and held in the greatest esteem, in his Treatise *de Navibus ob vestram vetitaram nationem commissis*, cap. 2. sect. 17 and 18, speaks of this method of trial.

With respect to appeals or reviews,—from Treaty between England and Holland, 1 Dec. 1674. Art. 12, as it is explained by Article 2. of the Treaty at Westminster, 6 Feb. 1755-16.—Treaty between England and France, at St. Germain's, 24 Feb. 1677. Art. 12.—Treaty of Commerce at Ryswick, 20 Sept. 1697, between France and Holland, Art. 33.—Treaty of Commerce at Utrecht, 31 March 1713, between Great Britain and France, Art. 31 and 32, and other Treaties,

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only governs so far as it is not derogated from by the treaty.

THUS by the law of nations, where two powers are at war, all ships are liable to be stopped and examined to whom they belong, and whether they are carrying contraband goods to the enemy; but particular treaties have enjoined a less degree of search, on the faith of producing solemn passports and formal evidences of property duly attested.

PARTICULAR treaties too have inverted the rule of the law of nations, and by agreement declared the goods of a friend on board the ship of an enemy to be prize, and the goods of an enemy on board the ship of a friend to be free, as appears from the treaties already mentioned, and many others\*.

So likewise, by particular treaties, some goods reputed contraband by the law of nations are declared to be free.

If a subject of the king of Prussia is injured by, or has a demand upon any person here, he ought to apply to your majesty's courts of justice, which are equally open and indifferent to foreigner or native; so, *vice versa*, if a subject here is wronged by a person living in the dominions of his Prussian majesty, he ought to apply for redress in the king of Prussia's courts of justice.

If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions.

THE law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the state, and

\* Particularly by the aforesaid Treaty between England and Holland, 1 Dec 1674, and the Treaty of Utrecht between Great Britain and France.

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justice absolutely denied *in re minime dubiâ* by all the tribunals, and afterwards by the prince\*.

WHERE the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions different men think and judge differently; and all a friend can desire is, that justice should be impartially administered to him, as it is to the subjects of that prince in whose courts the matter is tried.

### SECONDLY, as to the FACT.

WE have subjoined hereto two lists tallying with those marked A. and B. which were delivered to his grace the duke of Newcastle by mons. Michell, with the said memorial, the 23d of November last; and also printed at the end of the said *Exposition des Motifs*, &c. from whence it will appear, that as to the list A. which contains 18 ships and their cargoes, •

IF ever taken were restored by the captors themselves, 4.  
to the satisfaction of the Prussians, who never have complained in any court of justice here.

WAS restored by sentence, with full costs and damages, which were liquidated at 2801l. 12s. 1d. sterling. 1.

SHIPS were restored by sentence, with freight, for such 3.  
of the goods as manifestly belonged to the enemy, and were condemned.

SHIPS were restored by sentence, but the cargoes, or 4.  
part of them, condemned as prize or contraband, and not now alledged in the list A. or B. to have been Prussian property.

\* *Grotius de Jure Belli ac Pacis*, lib. 3. cap. 2. sect. 4. 5.

Treaty between England and Holland, 31 July 1667. Art. 31. Reprisals shall not be granted till justice has been demanded according to the ordinary course of law.

Treaty of Commerce at Ryswick, 20 Sept. 1697, between France and Holland, Art. 4. Reprisals shall not be granted but on manifest denial of justice.

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5. SHIPS and cargoes were restored by sentence, <sup>1</sup> but the claimant subjected to pay costs, because, from the ship-papers and preparatory examinations, there was ground to have condemned, and the restitution was decreed merely on the faith of affidavits afterwards allowed.

1. SHIP and cargo was restored by sentence upon an appeal, but, from the circumstances of the capture, without costs on either side.

THERE need no observations upon this list. As to the eight cases first above mentioned, there cannot be the colour of complaint.

As to the four next, the goods must be admitted to have been rightly condemned, either as enemy's property or contraband, for they are not now mentioned in the lists A. or B.

If contraband, the ship could have neither freight nor costs, and the sentences were favourable in restoring the ships, upon presumption that the owners of the ships were not acquainted with the nature of the cargo or the owners' error. If enemy's property, the ships could not be entitled to freight, because the bills of lading were false, and purported the property to belong to Prussians.

THE ships could not be entitled to costs, because the cargoes, or part of them, being lawful prize, the ships were rightly brought in.

As the six remaining ships and cargoes were restored, the only question must be upon paying or not receiving <sup>costs</sup>, which depends upon the circumstances of the capture, the fairness of the ship's <sup>captain's</sup> documents, and conduct of her crew; and neither the Prussian commissioners, the said memorial, or said *Exposition des Motifs*, &c. alledge a single reason why, upon the particular circumstances of these cases, the sentences were wrong.

As

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As to the list B.

EVERY ship, on board which the subjects of Prussia claim to have had property, was bound to or from a port of the enemy; and many of them appeared to be, in part, laden with the goods of the enemy, either under their own or fictitious names.

IN every instance where it is suggested that any part of the cargo belonged to a Prussian subject, though his property did not appear from the ship's papers, or preparatory examinations, which it ought to have done, sufficient time was indulged to that Prussian subject to make an affidavit that the property was *bonâ fide* in him; and the affidavit of the party himself has been received as proof of the property of the Prussian, so as to intitle him to restitution.

WHERE the party will not swear at all, or swears evasively, it is plain he only lends his name to cover the enemy's property, as often came out to be the case beyond the possibility of doubt.

IT appears by a letter 29th of May and 9th of June, 1747, from monf. Andriè to his Prussian majesty, exhibited in a cause, and certified to be a true extract by monf. Michell under his hand, that this colourable manner of screening the goods of the enemy was stated in the following words:

“ YOUR majesty's subjects ought not to load on board  
“ neutral ships any goods really belonging to the enemies  
“ of England, but to load them for their own account,  
“ whereby they may safely send them to any country they  
“ shall think proper, without any risk. Then, if privateers  
“ commit any damage to the ships belonging to your  
“ majesty's subjects, you may depend on full justice  
“ being done here, as in all the like cases hath been  
“ done.”

LIST



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LIST B. contains thirty-three cases.

2. Two of them never came before a court of justice in England, but (if taken) were restored by the captors themselves, to the entire satisfaction of the owners.
16. In sixteen of them the goods claimed by the Prussian subjects appear to have been actually restored, by sentence, to the masters of ships in which they were laden; and by the customs of the sea the master is in the place of the lader, and answerable to him.
14. In fourteen of the cases the Prussian property was not verified by the ship's papers, or preparatory examinations, or claimant's own affidavit, which he was allowed time to make.
- 1  
33 AND the other cause, with respect to part of the goods, is still depending, neither party having moved for judgment\*. And so conscious were the claimants that the court of admiralty did right, there is not an appeal, in a single instance, in list B.; and but one in list A.

THIRDLY, to apply, the law to the FACT.

THE sixth question in the said *Exposition des Motifs*, &c. states the right of reprisals to be, "*pulsqu'on leur a si long tems denie toute la justice, qu'ils estoient fondés de demander.*"

THE said memorial founds the justice and propriety of his Prussian majesty's having recourse to reprisals, because his subjects, "*n'ont pu obtenir jusqu'à present aucune justice des tribunaux Anglois qu'ils ont réclamés ou du gouvernement auquel ils ont pu les plaider.*" And in another part of the memorial it is put, "*apres avoir en vain demandé des reparations de ceux qui seuls pouvoient les faire.*"

\* The Prussian has since applied for judgment on the 29th of January, and obtained restitution.

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THE contrary of all which is manifest from the above state and lists hereto annexed:

IN six of the cases specified, if such captures ever were made, the Prussian subjects were so well satisfied with the restitution made by the captors, that they never complained in any court whatsoever of this kingdom.

THE rest were judged of by a court of admiralty, the only proper court to decide of captures at sea, both with respect to the restitution and the damages and costs; acting according to the law of nations, the only proper rule to decide by; and justice has been done by the court of admiralty so impartially, that all the ships alledged in list A. to have been Prussian were restored, and all the cargoes mentioned in either list, A. or B. were restored, excepting fifteen, one of which is still undetermined.

AND, in all the cases in both lists, justice was done so entirely to the conviction of the private conscience of the Prussian claimants, that they have acquiesced under the sentences without appealing, except in one single instance, where the part of the sentence complained of was reversed;

THOUGH the Prussian claimants must know that, by the law of nations, they ought not to complain to their own sovereign till injustice *in re minimè dubiâ* was finally done them, past redress; and though they must know that rule of the law of nations held more strongly upon this occasion, because the property of prize was given to the captors, and ought therefore to be litigated with them. The Prussian who, by his own acquiescence, admits to the captors having the prize, cannot afterwards with justice make a demand upon the state. If the sentence was wrong, it is owing to the fault of the Prussian that it was not redressed. But it is not attempted to be shewn, even now, that these sentences were unjust in any part of them, according to the evidence and circumstances appearing before the court of admiralty; and that is the criterion.

For

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FOR as to the Prussian commission to examine these cases, *ex parte*, upon new suggestions, it never was attempted in any country of the world before: prize or not prize, must be determined by courts of admiralty belonging to the power whose subjects make the capture. Every foreign prince in amity has a right to demand that justice shall be done his subjects in these courts, according to the law of nations, or particular treaties, where any are subsisting. If *in re minimè dubiâ* these courts proceed upon foundations directly opposite to the law of nations, or subsisting treaties, the neutral state has a right to complain of such determination.

BUT there never was, nor never can be, any other equitable method of trial. All the maritime nations of Europe have, when at war, from the earliest times, uniformly proceeded in this way, with the approbation of all the powers at peace. Nay, the persons acting under this extraordinary and unheard-of commission from his Prussian majesty, do not pretend to say, that in the four cases of goods condemned here, for which satisfaction is demanded in list A. the property really belonged to Prussian subjects; but they profess to proceed upon this principle, evidently false, that though these cargoes belonged to the enemy, yet, being on board any neutral ship, they were not liable to enquiry, seizure, or condemnation.

FOURTHLY, from the questions, rules, reasonings, and matters alleged in the said memorial, sentences of the Prussian commissioners, and *Exposition des Motifs*, &c. the following Propositions may be drawn as carrying the appearance of objections to what has been above laid down:

### FIRST PROPOSITION.

“THAT by the law of nations the goods of an enemy cannot be taken on board the ship of a friend;  
and

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“ and this the Prussian commissioners lay down as the basis  
“ of all they have pretended to do.”

ANSWER. The contrary is too clear to admit of being disputed. It may be proved by the authorities of every writer of the law of nations; some of different countries are referred to\*. It may be proved by the constant practice, ancient and modern; but the general rule cannot be more strongly proved than by the exception which particular treaties have made to it†.

### SECOND PROPOSITION.

“ IT is alledged that lord Carteret, in 1744, by two  
“ verbal declarations, gave assurances in your majesty’s

\* *Il Consolato del Mare*, cap. 273, expressly says, “ The enemy’s goods, found on board a friend’s ship, shall be confiscated.” And this is a book of great authority.

*Grotius de Jure Belli ac Pacis*, lib. iii. cap. 1, Section 5, numero 4; in the notes, cites this passage, in the *Il Consolato*, and in his notes, lib. iii. cap. 6, Sect. 6.

*Loccenius de Jure Maritimo*, lib. ii. cap. 4, Sect. 12.

*Voet de Jure Militari*, cap. 5, nu. 21.

• *Heinccius*, the learned Prussian before quoted, *de Navibus ob Vecturam vestrarum Mercium commissis*, cap. 2, Sect. 9, is clear and explicit upon this point.

*Bynkershoek Quaestiones Juris Publici*, lib. i. cap. 14, per totum.

*Zouch* (an Englishman) in his book *de Judio inter Gentes*, pars 2, Sect. 8, numero 6.

Treaty between Great Britain and Sweden, 23 Oct. 1661. Art. 12 and 13; Treaty between Great Britain and Denmark, 19 Nov. 1669. Art. 2; and the Passport or Certificate, issued by that Treaty, are material as to this point.

† Treaty between France and England, 24 Feb. 1677. Art. 8.

Treaty of Utrecht between France and England, 1713. Art. 1.

Treaty between England and Holland, 17 Feb. 1668. Art. 10.

Treaty between England and Holland, 1 Dec. 1674. Art. 8.

Treaty between England and Portugal, 10 July, 1654. Art. 23.

Treaty between France and the States General at Utrecht, 11 April, 1713. Art. 26.

“ name that nothing on board a Prussian ship should be  
 “ seized, except contraband; consequently, that all effects  
 “ not contraband, belonging to the enemy, should be free;  
 “ and that these assurances were afterwards confirmed  
 “ in writing by lord Chesterfield, the 5th of January  
 “ 1747.”

ANSWER. The fact makes this question not very material, because there are but four instances in lists A. or B. where any goods on board a Prussian ship have been condemned; and no satisfaction is pretended to be demanded for any of those four cargoes in lists A. and B. However, it may be proper to shew how groundless this pretence is.

TAKING the words alledged to have been said by lord Carteret as they are stated, they do not warrant the inferences endeavoured to be drawn from them. They import no new stipulation different from the law of nations, but expressly profess to treat the Prussians upon the same foot with the subjects of other neutral powers under the like circumstances; *i. e.* with whom there was no particular treaty. For the reference to neutral powers cannot be understood to communicate the terms of any particular treaty. It is not so said. The treaties with Holland, Sweden, Russia, Portugal, Denmark, &c. all differ. Who can say which was communicated? There would be no reciprocity: the king of Prussia does not agree to be bound by the clauses to which other powers have, by their respective treaties, agreed. No Prussian goods on board an enemy's ship have ever been condemned here, and yet they ought, if the treaties with Holland were to be the rule between Great Britain and Prussia; nay, if these treaties were to be the rule, all now contended for, on the part of Prussia, is clearly wrong; because, by treaty, the Dutch, in the last resort, are to apply to the court of appeal here.

*Treaty*

*Treaty of Alliance between Great Britain and Holland, at Westminster, the 6th of Feb. 1715-16, Article II.*

“ WHEREAS some disputes have happened touching  
“ the explanation of the 12th article of the treaty marine  
“ in 1674, it is agreed and concluded for deciding any  
“ difficulty upon that matter, to declare by these presents,  
“ that by the provisions mentioned in the said article, are  
“ meant those which are received by custom in Great  
“ Britain and the United Provinces, and always have been  
“ received, which have been granted, and always are  
“ granted, in the like case, to the inhabitants of the said  
“ countries, and to every foreign nation.”

LORD Carteret is said twice to have refused, in which  
monsieur Andrie acquiesces, to give anything in writing,  
as not usual in England.

SUPPOSING the conversations to mean no more than a  
declaration of course that justice should be done to the  
Prussians in like manner as to any other neutral power with  
whom there was no treaty, there was no occasion for in-  
struments in writing; because in England the crown never  
interferes with the course of justice. No order or intima-  
tion is ever given to any judge. Lord Carteret therefore  
knew that it was the duty of the court of admiralty to do  
equal justice, and that they would, of themselves, do what  
he said to monsieur Andrie.

HAD it been intended, by agreement, to introduce be-  
tween Prussia and England a variation in any particular  
from the law of nations, and consequently a new rule for  
the court of admiralty to decide by, it could only be done  
by a solemn treaty, in writing, properly authorized and  
authenticated. The memory of it could not otherwise be  
preserved; the parties interested and the courts of admi-  
ralty could not otherwise take notice of it.

BUT lord Chesterfield's confirmation, in a letter of  
the 5th of January 1747, being relied upon, the books

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of the secretary's office have been searched, and the letter to monsieur Michell is found, which is *verbatim* as follows:

*A Whitehall, le 5 Janv. 1747-8.*

“ M O N S I E U R,

“ *AYANT* eu l'honneur de recevoir les ordres du roy sur  
“ ce qui a formé le sujet du memoire que vous m'avez  
“ remis du 8 de ce mois, N. S. Je n'ai pas voulu tarder  
“ à vous informer, que sa majesté, pour ne rien omettre  
“ par où elle peut temoigner ses attentions envers le roy  
“ votre maitre, ne fait nulle difficulté de declarer, qu'elle  
“ n'a jamais eu l'intention, ni ne l'aura jamais, de donner le  
“ moindre empeschement à la navigation des sujets Prussiens,  
“ tant qu'ils auront soin d'exercer leur commerce d'une ma-  
“ niere licite, et conformement à l'ancien usage établi et re-  
“ connu parmi les puissances neutres.

“ Que sa majesté Prussienne ne peut pas ignorer, qu'il y  
“ a des traités de commerce qui subsistent actuellement entre  
“ la Grande Bretagne et certaines etats neutres, et qu'au  
“ moyen des engagements formellement contractés de part et  
“ d'autre par ces mêmes traités, tout ce qui regarde la  
“ maniere d'exercer leur commerce reciproquement, a été  
“ finalement constaté et réglé.

“ Qu'en même tems il ne paroît point qu'aucun traité de  
“ la nature susdite existe à present, ou a jamais existé, entre  
“ sa majesté et le roy de Prusse; mais que pourtant cela  
“ n'a jamais empêché que les sujets Prussiens n'ayent été fa-  
“ vorisés par l'Angleterre, par rapport à leur navigation,  
“ autant que les autres nations neutres: et cela étant, sa  
“ majesté ne presuppose pas, que l'idée du roy votre maitre  
“ seroit d'exiger d'elle des distinctions, encore moins des pre-  
“ ferences, en faveur de ses sujets à cet égard.

“ Que de plus sa majesté Prussienne est trop éclairée  
“ pour ne pas connoître, qu'il y a des loix fixes et établies  
“ dans

“ dans le gouvernement, dont on ne peut nullement s'écarter;  
 “ et que s'il arrivoit que la marine Angloise s'avisât de  
 “ faire la moindre injustice aux sujets commerçans du roy  
 “ votre maitre, il y a un tribunal ici, savoir, la haute cour  
 “ de l'amirauté, à laquelle ils se trouvent en droit de s'adresser  
 “ et de porter leurs plaintes; assurés d'avance, en pareil  
 “ cas, qu'on leur y rendra bonne justice; les procédés juri-  
 “ diques de ladite cour étant et ayant été de tout tems hors  
 “ d'atteinte et irréprochables; témoin, nombre d'exemples,  
 “ où des vaisseaux neutres, pris illicitement, ont été restitués  
 “ avec fraix et dommages aux propriétaires.

“ Voici ce que le roy m'a ordonné de vous répondre sur le  
 “ contenu de votre dit memoire; et sa majesté ne sauroit que  
 “ se flatter, qu'en conséquence de ce que je viens d'avancer,  
 “ il ne restera plus rien à desirer au roy votre maitre rela-  
 “ tivement à l'objet dont il est question; et le roy s'en croit  
 “ d'autant plus assuré, qu'il est persuadé que sa majesté  
 “ Prussienne ne voudroit rien demander que ne fut équi-  
 “ table.

“ Je suis, avec bien de la considération,

“ Monsieur,

• “ Votre très humble & très

“ Obeissant serviteur,

“ CHESTERFIELD.”

•  
 •  
 THERE need no observations; it is explicit, and in  
 exprefs terms puts Prussia upon the foot of other neutral  
 powers with whom there was no treaty, and points out the  
 proper way of applying for redress.

THE verbal declarations made by lord Carteret in 1744,  
 which are said to have been confirmed by this letter from  
 lord Chesterfield, cannot have meant more than the letter  
 expresses.

AND it is manifest by the above extract from monsieur  
 Andrieu's letter to his Prussian majesty, that in May 1747



monfieur Andrié himfelf underftood that goods of the enemy taken on board neutral fhips ought to be condemned as prize.

It is evident, from authentic acts, that the fubjects of Pruffia never underftood that any new right was communicated to them.

BEFORE the year 1746 the Pruffians do not appear to have openly engaged in covering the enemy's property.

THE men of war and privateers could not abftain from captures in confequence of lord Carteret's verbal affurances in 1744, becaufe they never were nor could be known; and there was no occafion to notify them, fuppoſing them only to promiſe impartial juſtice. For all fhips of war were bound to act, and courts of admiralty to judge, according to the law of nations and treaties.

THAT 1746 the Pruffian documents were, a certificate of the admiralty, upon the oath of the builder, that the ſhip was Pruffian-built; and a certificate of the admiralty, upon the oath of the owner, that the ſhip was Pruffian property.

FROM 1746 the Pruffians engaged in the gainful practice of covering the enemy's goods, but were at a loſs in what ſhape and upon what pretences it might beſt be done.

ON board the ſhip the *Trois Soeurs* was found a paſs bearing date at Stettin the 6th of October 1746, under the royal ſeal of the Pruffian regency of Pomerania, &c. alledging the cargo, which was ſhip timber, bound for Port L'Orient, to be Pruffian property, and, in confequence thereof, claiming freedom of the ſhip.

CLAIMING freedom to the ſhip from the property of the cargo being quite new, the propoſition was afterwards reverſed. And on board a ſhip called the *Jumcaux*, was found a paſs bearing date at Stettin the 27th of June 1747, under the royal ſeal, &c. alledging the ſhip to be Pruffian property.

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property, and, in consequence thereof, claiming freedom to the goods.

BUT this pass was not solely relied on, for there was also found on board the same ship another pass, bearing date at Stettin the 14th of June 1747, under the royal seal, &c. alledging the cargo to be Prussian property.

AND it is remarkable that the oaths upon which these passes were granted, appeared manifestly to be false; and neither of the cargoes to which they relate are now so much as alledged to have been Prussian property in said lists A. or B.

IT being mentioned in the said *Exposition des Motifs*, &c. that monf. Michell, in September 1747, made verbal representations to lord Chesterfield in respect to the cargo taken on board the said ship called the *Trois Soeurs*, which was claimed as Prussian property, and no mention being made in lists A. and B. of the said cargo, we directed the proceedings in that cause to be laid before us; where it appears in the fullest and clearest manner, from the ship-papers and depositions, that the cargo was timber, laden on the account and at the risque of Frenchmen to whom it was to be delivered at Port L'Orient, they paying freight according to charter-party; that the Prussian claimant was neither freighter, lader, or consignee; and had no other interest or concern in the matter than to lend his name and conscience; for he swore that the cargo was his property, and laden on or before the 6th of October 1746, and yet the ship was then in ballast, and the whole of the cargo in question was not laden before May 1747.

SEVERAL other Prussian claims had, in like manner, come out so clearly to be merely colourable, that monf. Andrieu, from his said letter the 29th of May and 9th of June 1747, appears to have been ashamed of them.

### THIRD PROPOSITION.

“THAT lord Carteret, in his said two conversations, specified, in your majesty's name, what goods should be deemed contraband.”

ANSWER. THE fact makes this question totally immaterial, because no goods condemned as contraband, or which were alledged to be so, are so much as now suggested to have been Prussian property in the said lists A. and B.; and therefore, whether as enemy's property or contraband, they were either way rightly condemned; and, the bills of lading being false, the ships could not be entitled to freight.

BUT if the question was material, the verbal declarations of a minister in conversation might shew what he thought contraband by the law of nations, but never could be understood to be equivalent to a treaty derogating from that law.

ALL the observations upon the other parts of these verbal declarations hold equally as to this.

### FOURTH PROPOSITION.

“THAT the British ministers have said that these questions were decided according to the laws of England.”

ANSWER. They must have been misunderstood; for the law of England says, that all captures at sea, as prize, in time of war, must be judged of in a court of admiralty, according to the law of nations and particular treaties, where there are any.

THERE never existed a case where a court, judging according to the laws of England only, ever took cognizance of prize.

THE property of prizes being given during the last war to the captors, your majesty could not arbitrarily release.

PRUSSIAN MEMORIAL, CONCERNING NEUTRAL SHIPS.

leave the capture, but left all cases to the decision of the proper courts, judging by the law of nations and treaties where there were any; and it never was imagined that the property of a foreign subject, taken as prize on the high seas, could be affected by laws peculiar to England.

FIFTH PROPOSITION.

“THAT your majesty could no more erect tribunals for trying these matters than the king of Prussia,”

ANSWER. Each crown has, no doubt, an equal right to erect admiralty courts for the trial of prizes taken by virtue of their respective commissions; but neither has a right to try the prizes taken by the other, or to reverse the sentences given by the other's tribunal. The only regular method of rectifying their errors is, by appeal to the superior court.

THIS is the clear law of nations; and by this method prizes have always been determined in every other maritime country of Europe as well as England.

SIXTH PROPOSITION,

“THAT the sea is free,”

ANSWER. They who maintain that proposition in its utmost extent, do not dispute but that when two powers are at war they may seize the effects of each other upon the high seas, and on board the ships of friends; therefore that controversy is not in the least applicable upon the present occasion\*.

\* This appears from Grotius in the passages above cited, lib. 3. cap. 1. sect 5. nu. 4. in his notes; and lib. 3. cap. 6. sect. 6. in his notes.

SEVENTH PROPOSITION.

“ GREAT Britain issued reprisals against Spain, on account of captures at sea.”

ANSWER. These captures were not made in time of war with any power.

THEY were not judged of by courts of admiralty, according to the law of nations and treaties, but by rules, which were themselves complained of in revenue courts; the damages were afterwards admitted, liquidated at a certain sum, and agreed to be paid by a convention, which was not performed; therefore reprisals issued, but they were general. No debts due here to Spaniards were stopped; no Spanish effects here were seized; which leads to one observation more.

THE king of Prussia has engaged his royal word to pay the Silesia debt to private men.

IT is negotiable, and many parts may have been assigned to the subjects of other powers. It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men. There is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honour, because a prince cannot be compelled, like other men, in an adverse way, by a court of justice. So scrupulously did England France and Spain adhere to this public faith, that even during the war they suffered no enquiry to be made whether any part of the public debts was due to subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours.

THIS loan to the late emperor of Germany, Charles the VIth, in January 1734-5, was not a state transaction, but a mere private contract with the lenders, who advanced their money upon the emperor's obliging himself, his heirs and

## PRUSSIAN MEMORIAL, CONCERNING NEUTRAL SHIPS.

and posterity, to repay the principal, with interest, at the rate, in the manner, and at the times in the contract mentioned, without any delay, demur, deduction or abatement whatsoever; and, lest the words and instruments made use of should not be strong enough, he promises to secure the performance of his contract in and by such other instruments, method, manner, form, and words, as should be most effectual and valid to bind the said emperor, his heirs, successors and posterity, or as the lenders should reasonably desire.

As a specific real security, he mortgaged his revenues arising from the Duchies of Upper and Lower Silesia for payment of principal and interest; and the whole debt, principal and interest, was to be discharged in the year 1745. If the money could not be paid out of the revenues of Silesia, the emperor, his heirs and posterity, still remained debtors, and were bound to pay. The eviction or destruction of a thing mortgaged, does not extinguish the debt or discharge the debtor.

THEREFORE the empress queen, without the consent of the lenders, made it a condition of her yielding the Duchies of Silesia to his Prussian majesty, that he should stand in the place of the late emperor in respect of this debt.

THE seventh of the preliminary articles between the queen of Hungary and the king of Prussia, signed at Breslau the 11th of June 1742, is in these words: "*Sa majesté le roi de Prusse se charge du seul paiement de la somme hypothéquée sur la Silesie, aux marchands Anglois, selon le contrat signé à Londres le 7me de Janvier 1734-5.*"

THIS stipulation is confirmed by the ninth article of the treaty between their said majesties, signed at Berlin the 28th of July 1742.

ALSO renewed and confirmed by the second article of the treaty between their said majesties, signed at Dresden the 25th of December 1745.

IN consideration of the empress queen's cession, his Prussian majesty has engaged to her that he will pay this money *selon le contract*, and consequently has bound himself to stand in the place of the late emperor in respect of this money, to all intents and purposes.

THE late emperor could not have seized this money as reprisals, or even in case of open war between the two nations, because his faith was engaged to pay it without any delay, demur, deduction, or abatement whatsoever. If these words should not extend to all possible cases, he hath plighted his honour to bind himself by any other form of words more effectually to pay the money; and therefore was liable at any time to be called upon to declare expressly that it should not be seized as reprisals, or in case of war; which is very commonly expressed when sovereign princes or states borrow money from foreigners. Therefore, supposing for a moment that his Prussian majesty's complaint was founded in justice and the law of nations, and that he had a right to make reprisals in general, he could not, consistent with his engagements to the empress queen, seize this money as reprisals. Beside, this whole debt, according to the contract, ought to have been discharged in 1745. It should, in respect of the private creditors, in justice and equity, be considered as if the contract had been performed; and the Prussian complaints do not begin till 1746, after the whole debt ought to have been paid.

UPON this principle of natural justice, French ships and effects wrongfully taken after the Spanish war, and before the French war, have, during the heat of the war with France, and since, been restored by sentence of your majesty's courts to the French owners. No such ships or effects ever were attempted to be confiscated as enemy's property here during the war; because, had it not been for the wrong first done, these effects would not have been in your majesty's dominions. So, had not the contract

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tract been first broke by non-payment of the whole loan in 1745, this money would not have been in his Prussian majesty's hands.

YOUR majesty's guaranty of these treaties is entire, and must therefore depend upon the same conditions upon which the cession was made by the empress queen.

BUT this reasoning is, in some measure, superfluous; because, if the making any reprisals upon this occasion be unjustifiable, which we apprehend we have shewn, then it is not disputed but that the non-payment of this money would be a breach of his Prussian majesty's engagements, and a renunciation, on his part, of those treaties.

ALL which is most humbly submitted to your majesty's royal wisdom.

GEO. LEE.

G. PAUL.

D. RYDER.

W. MURRAY.

January 18, 1753.

*Translation of the* EARL of CHESTERFIELD's *Letter to*  
*Monsieur MICHELL.*

SIR,

*Whitehall, January 5, 1747-8.*

HAVING had the honour to receive the king's orders upon the subject of the memorial which you delivered to me on the 8th instant, N. S. I would not delay informing you that his majesty, in order to omit nothing whereby he may shew his attention to the king your master, makes no difficulty in declaring, that his majesty has never had, or will have, any intention to give any interruption to the navigation of the Prussian subjects, as long as they shall take care to carry on their commerce in a lawful manner, and conformably to the ancient usage as established and acknowledged amongst neutral powers.

HIS



HIS Prussian majesty cannot be ignorant that there are treaties of commerce actually subsisting between Great Britain and certain neutral states, and that by means of the engagements formerly contracted on each side by those treaties, every thing relating to the manner of reciprocally carrying on their commerce has been finally settled and regulated.

AT the same time it does not appear that any such treaty exists at present, or ever did exist, between his majesty and the king of Prussia; nevertheless that has never hindered the Prussian subjects being favoured by England, with respect to their navigation, as much as other neutral nations: and his majesty does not suppose that the king your master means to require distinctions from his majesty, much less any preferences, in favour of his subjects in this point.

HIS Prussian majesty is too well informed not to know that there are in this government fixed and established laws which cannot be departed from; and that in case any English ships of war should commit the least injustice to the trading subjects of the king your master, here is a tribunal, *viz.* the high court of admiralty, where they have a right to apply and make their complaints; and they may be previously assured, that in such case impartial justice will be administered to them; the juridical proceedings of the said court being, and having ever been unimpeached and irreproachable, as appears by numerous examples of neutral vessels illegally taken having been restored with costs and damages to the proprietors.

THIS is the answer the king has ordered me to give upon the contents of your said memorial; and his majesty cannot but flatter himself that, in consequence hereof, the king your master's desire will be fully answered, with relation to the point in question; and of which his majesty is the more assured, as he is persuaded that the king of

of Prussia would not require any thing but what is equitable.

I am,

With much consideration,

S I R,

Your most obedient,

And most humble servant,

CHESTERFIELD.

*Translation of Mr. PETER TRAPAUD's Declaration of his, having made Satisfaction to the PRUSSIANS for the Damage received by the Ship St. John, No. 16, in List A.*

IN the exposition which his Prussian majesty has published of such ships of his subjects as were taken by the English in the last war, I have observed in the list A. No. 16, that the ship St. John, John Grosse captain, is therein mentioned as having received some damages to the prejudice of the Prussian owners. As the fact is known to me, as I was the sole owner of her cargo, I do hereby, as such, testify the truth, for the satisfaction of all whom it may concern; and I cannot conceive how the Prussian subjects dare demand an indemnification, which they have already more than received, as I am going to convince them.

IN the month of November 1747, I ordered the said ship to be freighted at Bourdeaux, and loaded at Lisbon with 158½ tons of white wine. On the 1st of December following that ship put out to sea. On the 11th of the said month she got as far as the Downs, where she was met by an English privateer, called the Prince of Orange, who sent six of his men on board the Prussian ship, and had the Prussian pilot brought on board him, with the ship papers and documents, in order to their being examined. On the 12th of the said month, as she lay at an anchor, a  
great

great storm arose from the W. S. W. which obliged the Prussian captain, with the consent of his crew and of the six Englishmen who were then on board his ship, to cut his cable in order to drive off to sea. The ship got afterwards into Browerhaven Inlet in Holland, on the 15th of the said month of December, without any other damage than the loss of part of her cable and of an anchor, and arrived at Rotterdam the 21st of the said month. All this is proved by the declaration of both the captain and his crew, made on the 4th of January 1748, before Jacob Bremer, notary public in Rotterdam, and afterwards sworn to on the 6th of the said month before the commissioners of the chamber of maritime affairs.

AFTER the ship was unloaded, the captain gave in to me his account for gross average, consisting of the following articles:

1. FOR the loss of his cable and anchor.

2. FOR the maintaining, during eight days, the six men who had been put on board his ship by the English privateer.

3. FOR a passport I procured for him from the Prussian envoy at the Hague, which cost 3 or 4 florins.

I PAID him for my share in that gross average 704 florins, Holland currency, over and above 105 florins which I gave captain Grosse as a present, and 10 florins 10 stivers I gave as a present to the crew of his ship: beside all this, it cost me 20 florins, or thereabouts, in England, which messrs. Simond (brothers) had disbursed by my order for the Prussian pilot who remained on board the privateer after the storm had parted them.

THOSE who understand the navigation and fitting out of ships must allow, that the Prussian owners will find themselves more than reimbursed for all their pretensions by means of the 839 florins 10 stivers, Holland currency, which I have paid them; and that they cannot, with any foundation, make any other demands.

ALL

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*Ships* that I have alledged above, can be verified by authentic vouchers (except the presents or gratuities to the captain and his crew, amounting to 115 florins 10 stivers, for which I took no receipt). In witness whereof I have signed this present declaration. Rotterdam, January 30, 1753.

PETER TRAPAUD, jun.

LIST OF ALL THE PRUSSIAN SHIPS TAKEN BY BRITISH ARMAMENTS AT SEA, DURING THE LAST WAR, AS WELL THOSE DETAINED FOR EXAMINATION ONLY, AS THOSE JUDICIALLY PROCEEDED UPON, TOGETHER WITH THE JUDGMENTS GIVEN IN THE ADMIRALTY COURTS OF GREAT BRITAIN THEREUPON, TALLYING WITH HIS PRUSSIAN MAJESTY'S LIST MARKED A.

*Ships, which (if taken) were restored by the captors, upon examination, without either party applying to a court of justice.*

La Frederique Amitie, Capitaine Sprenger.—La Catharine Christine, Capit. Frederick Berend.—Le St. Jean \*, Capit. Jean Groffe.—Le Jeune Tobie, Capit. Paul Otto.

VOL. I.

M

*Ships*

On the 3d of February, the duke of Newcastle received a letter from Mr. Wolters, his majesty's agent at Rotterdam, enclosing the following declaration :

" DANS l'Exposition que sa majesté Prussienne a donnée au public  
des vaisseaux de ses sujets pris par les Anglois dans la dernière Guerre,  
j'ai remarqué dans la liste A. No. 16. que le navire le St. Jean, capitaine  
Jean Groffe, y est noté comme ayant reçu quelques dommages, au préju-  
dice des propriétés Prussiennes. Comme le fait m'est connu, ayant  
été seul propriétaire de la cargaison, je veux en cette qualité rendre  
mon témoignage

*Ships and goods restored, with all costs and damages owed the  
the capture.*

L'ANNE Elizabeth, Capit. Daniel Schultz, costs and  
damages, 280 l. 12s. 1d.

*Ships*

“ témoignage à la vérité, pour servir où il appartiendra. D'ailleurs, je  
“ ne puis comprendre comment les sujets Prussiens osent demander un  
“ dédommagement qu'ils ont déjà plus que reçu, comme je vais les en  
“ convaincre.

“ Dans le mois de Novembre 1747, j'eus fretter à Bordeaux, et  
“ charger à Libourne, le dit navire avec 158½ tonneaux de vin blanc.  
“ Le 1er. de Dec. suivant, ce navire sortit en mer. Le 11. du dit mois, il  
“ se trouva à la hauteur des Dunes ; il fut rencontré par le corsaire  
“ Anglois, nommé Le Prince d'Orange, qui envoya à bord du navire  
“ Prussien six hommes de son équipage, et fit venir à son bord le  
“ pilote Prussien avec les papiers de mer, pour en faire l'examen. Le 12.  
“ du dit mois, étant à l'ancre sous les dunes, il s'éleva une furieuse  
“ tempête de la part du W. S. W. qui obligea le capitaine Prussien, d'un  
“ consentement de son équipage, et des six Anglois pour lors dans son  
“ bord, de couper le cable pour gagner la mer. Ce navire entra ensuite  
“ dans le passage de Brouwerhaven en Hollande, le 15e. du dit mois de  
“ Décembre, sans avoir eu d'autre dommage que la perte d'une partie de  
“ son cable, et d'une ancre, et arriva ensuite à Rotterdam le 21e. du  
“ susdit mois. Tout ceci est constaté par la déclaration du capitaine et  
“ de son équipage, passée, le 4 Janvier 1748, pardevant Jacob Bremer,  
“ notaire public dans Rotterdam ; ensuite sermenté, le 6e. du dit mois,  
“ pardevant les commissaires de la chambre de la marine.

“ Après que le navire fut déchargé, le capitaine me fit fournir son  
“ compte d'Avarie grosse, dans lequel il portoit les articles suivants :

- “ 1. Pour la perte de son cable et de son ancre.
- “ 2. Pour la nourriture de 8, jours à 6 hommes qui avoient été mis  
“ par le corsaire Anglois sur son bord.
- “ 3. Pour un passeport que je lui fis donner à la Haye par l'envoyé de  
“ Prusse, qui couta 3 à 4 florins.

“ Je lui payai, pour ma portion, dans cette Avarie grosse, 704 florins,  
“ argent courant d'Hollande, en outre 105 florins dont je fis présent au  
“ capitaine Grosse, et 100. 100. aussi de prêt aux matelots qui  
“ composoient son équipage. Outre tout ceci, il m'en a coûté 20 florins  
“ ou environ, en Angleterre, pour autant que messrs. Simond, freres,  
“ avoient

*Ships restored with freight, according to the bills of lading, for such goods which were found to be the property of the enemy, and condemned as prize.*

L'AIGLE d'Or, Capit. Onne Arends.— La Dorothee Sophie, Capit. Pieter, Kettelhuth.—Les Deux Freres, Capit. Aug. Augustinus.

*Ships and goods restored, but without costs, from circumstances arising from the case.*

Le Petit David, Cap. Michael Bugdahl.

*Ships and cargoes restored, paying costs.—In these cases, it either appeared, that the ship had not the usual evidence of property, according to the custom of the sea; or from the ship-papers, or examination of the crew, there appeared just reason to presume the cargo to belong to the enemy, and the neuter claimant declined proving his property by strict legal evidence, and obtained restitution on the faith of his own affidavit; and, in these cases, courts of admiralty have always made the like decrees.*

La Dame Julienne, Capit. Martin Prest.—Le Frederick

II. Roy de Prusse, Capit. Chretien Schultze.—Le Vaiffeau

“avoient deboursé par mon ordre pour le pilote Prussien qui estoit resté à bord du corsaire, lorsque la tempête les separa.

“Ceux qui se connoissent en navigation et en armement de navire, ne pourront disconvenir, que les propriétaires Prussiens se trouvent, au moyen de 839 fl. 10 st. courans d'Hollande, que je leur ai payés, plus que remboursés de toutes leurs pretensions; et s'ils peuvent, avec quelque fondement, en demander d'autres.

“Tout ce que j'avance ci-dessus peut se verifier par des pieces authentiques (à la reserve des presents ou gratifications, au capitaine ou à son equipage, montant à 115 fl. 10 st. dont je n'ai pas retiré de quittance); en vertu de quoi j'ai signé la presente declaration. Rotterdam, ce 30 Janvier 1753.

PIERRE TRAPAUD, LE JEUNE.

The above declaration was signed in my presence, and the original vouchers quoted in the same have been produced to me. Witness my hand and seal.—Rotterdam, January, the 30th, 1753.

R. WOLTERS. (L. S.)

## DUKE OF NEWCASTLE'S ANSWER TO THE

au bon Vent. Capit. Michel Juriansen.—La Dagged the  
Capit. Martin Sperwien.—Les Deux Freres, Capit.  
Hallén.

*Cargoes, or part of them, condemned as contraband, and not  
now alleged, in list A. or B. to have been Prussian pro-  
perty, and therefore were certainly prize of war.*

Les Jumeaux, Capit. Kruth.—Le Soleil D'Or, Capit.  
Jacob Ridder.—Le Frederick II. Roy de Prusse, Capit.  
Chretien Schultz.—Le Jeune André, Capit. Henri  
Barckhorn.

*Appeal from the Admiralty Decrees.*

'Le Petit David, Cap. Micheal Bugdahl.

LIST OF ALL THE NEUTRAL SHIPS TAKEN BY BRI-  
TISH SHIPS DURING THE LAST WAR, IN WHOSE  
CARGOES THE SUBJECTS OF PRUSSIA CLAIM TO  
HAVE BEEN INTERESTED; TOGETHER WITH THE  
JUDGMENTS GIVEN BY HIS BRITANNICK MAJESTY'S  
COURTS OF ADMIRALTY THEREUPON, TALLYING  
WITH HIS PRUSSIAN MAJESTY'S LIST MARKED B.

LA Cecile, from Cetté to Altena, ship and cargo re-  
stored.

LE Nahring, from Rochelle to Bourdeaux, ditto.

LE Demoiselle Jeane, from Hambourg to Cadiz, ditto.

LE Carlshavener Weiff, from Hambourg to Cadiz, ditto.

L'ANNE Elizabeth, from Hambourg to Cadiz, ship re-  
stored, and cargo part restored.

LE Gustave Prince Royal, from Hambourg to Cadiz,  
ditto.

LE Jeune Benjamin, from Hambourg to Cadiz, ditto.

LE Prince Frederick, from Hambourg to Bilboa and  
Bayonne, ship and cargo restored.

LE

PREVIOUS. IN MEMORIAL, CONCERNING NEUTRAL SHIPS.

*Ships* Marie Joseph, from Hambourg to Cadiz, ditto.  
UNION, from Bourdeaux to Hambourg, ship restored,  
and cargo part restored.

LE Neptune, from Nants to Hambourg, ship and cargo  
restored.

LE St. Paul \*, from Nants to Hambourg, ditto.

LA Couronne, from Nants to Hambourg, ditto.

LA Demoiselle Catherine, from Rochelle to Altena, ship  
restored, and cargo part restored.

LA Concorde, from Rochelle to Hambourg, ditto.

LA Feaune, from Charante to Hambourg, ditto.

L'AMITIE, from Rochelle to Hambourg, ditto.

LE Jeune Prince Chretien, from Marseilles to Ham-  
bourg, ditto.

LA Dem. Marguerite, from Bourdeaux to Hambourg,  
ditto.

LE Roxier, from Bourdeaux to Hambourg, ditto.

LA Marie Sophie, from Rochelle to Hambourg, ditto.

L'ANNE Sophie, from Bourdeaux to Koningsberg.

LE Hop de Danzig, from Bourdeaux to Dantzick, ship  
restored, and cargo part restored.

LE Jeune Jeane, de Petersburg, from Bourdeaux to  
Hambourg, ditto.

LE Gregor et de Breme, from Bourdeaux to Hambourg,  
ditto.

LA Jeune Catherine, from Bourdeaux to Hambourg,  
ditto.

LES Six Soeurs, de Lubeck, from Bourdeaux to Lubeck,  
ditto.

LA Ste. Anne, de Hambourg, from Bourdeaux to  
Hambourg, ditto.

LE Jeune Eldert, de Hambourg, from Roan to Ham-  
bourg, ditto.

\* On the 29th of January, affidavits were exhibited in the court of  
admiralty, and sentence prayed on the part of the Prussian claimant, and  
the goods were decreed to be restored.



LE Juste Henri, de Hambourg, from Bourdeaux the  
Hambourg, ditto.

L'ELIZABETH, from Hambourg to Bourdeaux, ditto.

LA Demoiselle Claire, from Hambourg to Rean  
ditto.

L'ADOLPH Frederic, from Marseilles to Hambourg,  
ditto.

## No. VI.

**JAMES THE FIRST** having by letters patent granted to one Michell the office of making out Writs of Superfedeas in the Common Pleas, the Prothonotary, Brownlow, brought an *Affise* in the King's Bench in 13. Ja. to try the right to that office with the Patentee, claiming the appointment as a member and part of his office of Prothonotary. Upon this there issued a Writ directed to the Justices, commanding them not to proceed in the *Affise*, Rege Inconsulto. The legality of this Writ was contested by the Plaintiff in the *Affise*; and this point was argued by Harris, Hutton, and Richardson, serjeants, for the Plaintiff, and Chiborne, serjeant, and Culverton, solicitor general, for the Crown. It appears, that Sir Francis Bacon, the attorney general, was to have argued on a further day for the Crown, but the matter was in the mean time compromised; Michell was sworn into his office; and the King, as we are told, granted a privy seal, by which he relinquished all claim to grant in future any of the other members of the offices in the Common Pleas.

The following Argument is now given as the one composed by Sir Francis Bacon, but which, for the above reason, was never delivered. It must be confessed this piece has externally no other evidence of being the production of that distinguished personage, than that it is ascribed to him in the manuscript from whence it is now, for the first time, printed; but that it bears internal evidence of coming from his pen, it is presumed the reader can have no doubt on the perusal of it.

The claim to appoint to this office had been made by the Crown in the preceding reign; for we find in the 29. Eliz. the Prothonotary brought an *Affise* against the Patentee; and that upon a Writ De Regina Inconsultâ being tendered and argued, as on the present occasion, it was held by the Justices of the Common Pleas, that the patent was void; for the making out Writs of Superfedeas was part of the profit of the Prothonotary's office, of which he could not be disseised by the King's patent. Moore, 842. 3. Bulstrode, 82. 1. Roll. 188. 206. 288.

ARGUMENT of SIR FRANCIS BACON, BENT.  
ATTORNEY GENERAL, in the KING'S BENCH, in the  
CASE "DE REGE INCONSULTO, BETWEEN  
" BROWNLOW AND MICHELL."

**T**HIS case hath been well handled on the other side, if that may be said to be handled which, in the chief points, is scarcely touched; neither do I impute that to mr. Croke, that argued; who I know is learned, and hath taken a great deal of pains; but *ex nihilo nihil fit*, the fault was in the stuff, not in the workman: yet this I must say, that it is a strange form of proof to put a number of cases where this writ hath been obeyed, which is directly against you; and then to feign to yourself what was the reason why it was obeyed, and to go on and imagine that if it had been thus and thus it would not have been obeyed. Sir, the story is good; but your poetry why it was done, and what should have been done if the case had differed, therein you do but please yourself; it will never move the court at all.

Now I shall answer you so fully, as neither reason nor authority, which you have made and alledged, shall pass. But first I will confirm the truth of that I hold, and incidently in the proper place confute and encounter every objection that hath been or can be made; for, *rectum est iudex sui et obliqui*.

The writ of  
*non procedendo*  
*rege inconsulto.*

My lords, this writ *de non procedendo ad assisam, rege inconsulto*, is in its nature a mere stone of the king's inheritance, and as a hedge about his vineyard; and therefore it is good to take the oracle of the wise man against alterations (*qui voluit lapidem revertet super eum; et qui tollit sepem eum mordebit serpens*); he that removes the stone, it will turn upon him and crush him; and he that takes away an hedge, a serpent bred in that hedge shall bite him. But I little doubt

doubt by the help of this court, that this stone shall remain in the ancient term and bound, and that the hedge and fence shall continue in full repair.

BUT as the court said at the first truly, that this writ is not new, so I say again that the disallowance of this writ should be new; for I will maintain this universal negative, that since the law was law, this writ was never disallowed, but in the excepted case of an act of parliament. Evermore it hath closed, not the judges mouths, but that sometimes they have spoken in it, but ever their hands, that they never proceeded till they had leave; therefore if that should be done which was never done, it must be either in

The antiquity and worth of the writ.

The King's Counsel, the Court, or, the Matter itself.

FOR *the king's counsel*, we are the king's poor servants, but yet we shall be able so to carry the king's business, as it shall not die in our hands.

FOR *the court*, it is our strength; they are sworn to the king's rights and regalities, and if we should fail they (*ex officio*) ought to supply; much more will they aid us, we failing not. The judges of the land as they are the principal instruments of obedience towards the king in others, so have they ever been principal examples of obedience to the king in themselves. The twelve judges may be compared to the twelve lions supporting Solomon's throne; in that kind is their stoutness to be shewn, as it hath been now of late in a great business to their great honour, and therefore in the court I am sure the less will not be.

It rests then only that it must be in *the matter*; and this now shall be my labour to make plain, that in the matter it cannot be, wherein, my lord and the rest, if I have thought no pains too much, I beseech, you think no time too long.

THE

## Four causes.

THE proofs that I will deduce shall be from four causes of this writ, for they of all other places of argument are the strongest, like to a fortification from an higher ground; for all other places, *ab effectis, ab adjunctis, a simili*, they are but from flats and even grounds; but the argument from the causes are *à prænotioribus*, as from the chiefest commanding ground.

I WILL therefore open unto you, first, the end of this writ, the efficient of it, the matter of it, and the form of it; and out of all these I will prove most clearly the present case. Which parts before I deduce, I will give you at the first entrance a form or abstract of them all four, that, forethinking what you shall hear, the proof may strike upon your minds as prepared.

## 1. The end.

THE end of this matter is no other than the justest thing in the world, to prevent and provide that the king's rights be not questioned or prejudged in suits between common persons, the king not being made party, but that the impleading and discussing of the same be in the proper suit, court, or court.

## 2. The efficient.

THE efficient of this writ is that same *primogenita pars legis* which we call the king's prerogative; and, namely, that branch of it which is the king's prerogative in suits; for the common law of England (which is an old servant of the crown) as it entertaineth his majesty well and nobly wheresoever it meeteth him, in the very region and element of law, which is his judicial courts and suits, it welcometh him with a number of worthy prerogatives agreeable to monarchy, and yet agreeable to justice.

## 3. The matter.

THE matter of this writ is always loss and damage to the king, or possibility of loss and damage; wherein the law is provident, that it doth not so look to the present loss of the king, as it forgetteth future; nor so look to direct loss, as it forgetteth losses collateral, or by consequence; but is (as I said at first), by means of this writ, as a firm and perfect hedge or wall round about every side of the king's inheritances

inheritances and rights; and therefore I say, as I have already said, that Hampton-court, or Windsor-castle, is not so valuable to the king as this writ.

THE writ hath two parts, the certificate or recital of the king's title called in question, and the precept or mandative part; both which I will maintain to be sufficient, and warranted by law: but this part, concerning the form of the writ, induceth question of matter precedent and matter subsequent. The matter precedent is the king's title; the matter subsequent is the court's obedience; of both which also it is necessary to speak: upon which parts, when you have heard me, I hope to leave the court without all scruple, and fully fortified, not only in the matter, but in myself, that I speak not officiously in this case, or as a man that would make any thing good, but with science and conscience, and according to that I read and find.

For the first part therefore, which is the final cause for which this writ by law is devised and ordained, I will set forth unto you four things: 1st. The end.

FIRST, I will clear an error, or remove a mistaking, for that I will shew you that this writ is not a delay of justice, as it hath been conceived, but a direction of justice, turning of justice into the right way.

SECOND, Then I will lay down my ground, which is sound and infallible, that the king's title shall never be discussed in a plea between common persons, the king not made party.

THIRDLY, I will shew you in what court, and in what manner, the king is to be made party.

LASTLY, I will make it plain, that in this present case, in the assise between Brownlow and Michell, a right of the king, both in profit and power, and that valuable, and that of a very high nature, is to come in question to be discussed; so then, the full of this argument will be, wheresoever the king's right is to be questioned, in a plea between party and party,

party, there, after the writ of *rege inconsulto* purchased, the court ought not to proceed.

BUT in this assise between Brownlow and Michell the king's right falls out to be questioned; *ergo*, in this assise the court ought not to proceed.

THIS is a course plain and perspicuous, my lord; it is a wife saying, *sapiens incipit a fine*; so the mistaking (whether voluntary or ignorant, but gross and idle I am sure) of the end and use of this writ hath bred a great buzz, and a kind of amazement, as if this were a work of absolute power, or a strain of the prerogative, or a checking or shocking of justice, or an infinite delay; as if mr. Brownlow must not sit down and expect the good hour, and had no means to help himself; or as if all causes might thus be charmed asleep, and the wheel of justice arrested at pleasure; or that the statute of 2. E. 3. c. *that justice should not stay for great feai nor little feai*, should suffer violence; and such other popular and idle blasts.

Whether the  
king may  
create an office?

Now all this mist is soon scattered, when the state of the question is known, and truly expounded, which is no more but this, Whether the king's right to create and constitute a proper office for the making of *superfedas quia improvidi*, and appointing a reasonable fee to the same, and the king's property and royalty in the gift of the said office in perpetuity, shall be tried between Brownlow and Michell in the king's bench, or between Brownlow and the king in chancery?

So here is all this great matter, *mutatio fori et partis*; and therefore this writ is no dilatory or stay of suit, but the removing of a suit, whereby justice moves on still in a straight line; it giveth the party a better suit in disabling the present suit.

THAT this is so, you shall find it notably proved in *Arden and Darcy's case*, 38. Eliz. rot. 1128. which was the latest case of this writ. There, when the counsel of Arden alledged that this writ was a delay of justice, and that

that it was against the statute of 2. E. 3. that the judge should not stay for great seal nor petty seal, and chanted upon this ground; my lord Anderson, and the rest of the court, stopped that allegation, and said, just as I say now, that to obey this writ is not to delay justice to the subject, but to do justice to the king, and to draw justice to the right way; even as, should I stay and stop the water of the Thames or of a river from going into a by-let of creek, to make it run the better in the right channel, this were no stopping the stream, but guiding it; and I tell you plainly it is little better than a by-let or crooked creek, to try whether the king hath power to erect this office, in an assise between Brownlow and Michell.

So then let it be understood, that this writ is not to gain the king a little time to provide how to make his defence, and so to go on in this court, but plainly an alteration of the suit and of the court. As mr. Solicitor said prettily, the king saith now to the plaintiff, *in me convertite ferrum, nihil iste, nec ausus, nec potuit*; mr. Michell is now no more your adversary, but you must plead with the king. Marry, I differ from mr. Solicitor in that other point, that he thought the writ had been naught, if it had not the clause *donec aliud habueritis in mandatis*; for indeed I chuse that form as the fairest and most corrected; but I can shew many precedents without it; for it is never understood, though it be not expressed: for if the suit do fall out against the king in the chancery, then indeed you shall have *aliud mandatum*, that is a *procedendo*; but if it fall out for the king in the chancery, then your *donec* is like the *donec* of the scripture, *donec solvit ultimum dodrantem*, that is, never; for you shall never have *aliud mandatum*, but you shall have *iteratum mandatum* of a *superfedeas omnino*. But all this grows upon the same error, that men speak as if this writ were a mere dilatory; for then indeed mr. Solicitor says well, delays may not be infinite; but this is no dilatory but a directory, I say, a direction and reduction of justice from obliquity and circuit into

This writ is not to gain the king time, but to alter the course.



into a direct path; that is, to try the king's right in a plea with the king. So much for the discharge of the error or conceit of this writ.

The king must be made party, where his right cometh in question.

Now I come to the second point of my first part, which is, that where the king's right is questioned, he must be made party: for this, *res ipsa loquitur vel potius clamat*, the king shall not be surprised, nor stricken upon his back, nor made *accessorium quiddam* to the suit of another. If mr. Michell pretend to have right to the possession of the office of the *superfedas* and fee for *the present* by the king's grant, and the king pretends to the gift of it *afterwards*, the king shall not depend upon mr. Michell's suit, but mr. Michell upon the king's suit; and although mr. Michell's right be present, and the king's to come, yet posteriority in the king's case is always preferred. The rule ever holds between the king and the subject, that which is last shall be first, and that is first shall be last: for the books, they do so receive this maxim, and lay it for a law fundamental, and ground infallible, as I will not authorise principles. The best books are 39. E. 3. fol. 12. 31. E. 3. *faire aide de roy*, pl. 59. 7. H. 4. fo. 18. &c. These books have it, *disertis verbis*, and *in terminis terminantibus*, that the king's right shall not be tried, except he be made party; and the judges make a wonder of it, when they are pressed, *What would you have us do by the king's right without making him party?* But the cases that are not so vulgar, and yet do excellently express this learning, those I think worthy the putting.

The king's right is ever the principal, though it be last in time.

Aid shall be where the land is conveyed hanging the suit.

As, first, 12. *Affise*, pl. 49, the tenant in a *praescripte* conveyed the land to the king hanging the writ, and thereupon prayed aid of the king; and the court granted it; and two several judgments (saith Croke) were vouched for it. This is somewhat a strange case, and the hardest case that can be devised or put, of making the king party.

FOR, first, the relation of the writ avoids all mean conveyances, by maxim (a)

(a) Quære the maxim here alluded to.

AGAIN,

AGAIN, the act of the tenant ought to prejudice the demandant, as touching the tenancy, by maxim (b) ; and yet, nevertheless, this other maxim which we have now in hand, *that the king's right shall not be tried, except he be made party*, is stronger than the other two, and in law mates them : but Brooke, like a grave judge, in abridging the case saith, that the king is not in justice tied to give him aid, except he please ; which I conceive to be in regard of the mischief of maintenance.

(b) Quere the maxim here alluded to.

THE other case is an excellent case, and gives light by contraries ; and that is the case of 15. H. 7. fo. 10. where the king granted a wardship to J. S. and there was a traverse put into the office, by one that pretended right ; and a *scire facias* went out against the patentee, that had the grant of the wardship of the land, who came in and pleaded his estate by letters patents, and prayed in aid of the king. Saith the court, "Clearly you shall have no aid, you are at no mischief, for the king is party already, and you may *confut* with him." So you see plainly, that where the original suit is in the chancery, whereby the king is party already, there the law hath its effect without circuity ; and therefore, *à contrariis*, where he is not originally party, he must be made party.

Now for the reason of this, that the king must be made party in a number of cases, where a subject, if he were in the like case, should not have aid ; but must abide the event of the first suit ; it is, no doubt, partly in point of honour, because the law accounts the king's title, where it is connected with the right of the subject, to be the principal, like as in mines gold draws the copper, which is the subject, though it be in less quantity ; and partly and chiefly for the salvation of the king's rights ; for the king hath a number of privileges and prerogatives in his suits which the subject hath not. Thus his counsel shall be called to it, who are conversant and exercised in the learning of his prerogative, wherein common pleaders, be they never

ARGUMENT OF SIR FRANCIS BACON,

so good, are to seek ; and in the pleadings and proceedings themselves of the king's suits, what a garland of prerogative doth the law put upon them.

AGAIN, the king shall be informed of all his adversary's titles ; the king's plea cannot be double, he may make as many titles as he will : the king's demurrer is not peremptory ; he may waive it and join issue, and go back from law to fact, with infinite others. Will you strip the king of all these, and make them as ordained in vain, by questioning his right in a suit between common persons, which have no such privileges ? This, indeed, is *lesa majestas* ; for he that will tell me that the king's right shall be tried between *J. S.* and *J. D.* I will think him alike of kin to Jack Cade or Jack Straw.

How the king  
shall be made  
party.

THIS foundation being laid, that the king must be made party, then followeth the third point, which is, How he shall be made party ?

IT follows therefore of itself, *ex quâdam necessitate adamantinâ*, that the case can be no longer held in the common pleas or this court, for you will not revive old fables (as Justinian calls things of that nature), *Præcipe Henrico regi, &c. Præcipe Jacobo regi, &c.* That you will not do ; and yet it comes to that, if the king should be made a defender in this court, either directly or indirectly, as by *aid prayer*. Why then it follows that this suit must be in the chancery, where suits are tried properly, where the king is never upon defence, and where the king's rights or charters are tried likewise properly ; for there are petitions of right discussed ; there are declarations of right, which we call *monstraunces de droit*, sued ; there are traverses to offices ; and there are *scire facias* brought for repealing letters patents : for you may not come with a *queritur* against the king, but you must humbly *supplicate* unto him, or modestly *disclose*, and lay before him, your right, or civilly offer a *negative* of his right, as it is found. These be the ways that you must proceed in, when you have to deal with the majesty of a king ;

king; and for this, without all scruple, the chancery is the court; the chancery, I mean, in that capacity where it proceeds as a common law court, and not as a court of equity.

AND this you see by all the books shall not be only in the case of a mere suit, where the king is only party; but in a mixed suit, where the king is party together with a subject, as in the case of *aid*.

NOW then, if any man be so subtly ignorant (for there is a kind of subtle ignorance) as to think that the drawing of the suit into the chancery should be in case of the *aid*, and not of the plea of *rege inconsulto*; or in the plea of *rege inconsulto*, but not where the writ is brought; he is a stranger to the books, neither doth he advise the consequence of that he says.

FOR, first, this is a ground that strikes silence into any man, and cannot be replied unto, *that whatsoever advantage the king may have upon the prayer of the party, the same or higher he must have upon his own writ*, else you expose and abandon the king's rights to the neglect, or collusion of the party, and you allow the king to help another, and will not allow him to help himself, which is more than absurd; and therefore the ground is sound and certain, that *wheresoever you may have the AID or the PLEA, there you shall have the WRIT*; but not *E CONVERSO*, for the king shall not watch with the eyes of the party, but with his own eyes and his counsel's.

NOW to come to the authorities for the *aid*; I will not speak of them, because that is without colour or question; but for the *plea*, and for the *writ*, I will shew you plainly and plentifully, that the rule of the court, and the rule, or dismissal (as I may term it), of the court, when the king's right is once in question (*et dies datus est ad, &c. et iterum sequatur penes ipsum regem*, which is ever understood of the chancery), is not only in case of *aid*, but is common to the

*rege inconsulto*, either by *plea*, or by *office* of court, or by *writ*.

FIRST, For the plea of judgment, *si rege inconsulto*, you shall find, that although that plea and the *aid prayer* differ in the conclusion of the party, yet that the act of the court, and that which the court doth thereupon, is the same thing; for it is true, that if the party's state be too feeble to pray an aid, as when he is a copyholder and the like; or, on the other side, where the king's estate is too feeble to bear the nature of an aid; as when the lands are seized in respect of the king's tenants alienation, whom he licensed, or in respect of the prior alien, or the like.

IN all these cases the proper and natural conclusion of the party's plea ought to be, *petit iudicium, si rege inconsulto, &c.* and not *petit auxilium, &c.*: but the effect that follows thereupon is all one; for the court ceaseth, and the rule is, *sequatur penes ipsum regem*, and the court's hands are closed till a *procedendo* come. Nay, if you look advisedly into the books, you shall see that That which the court doth upon the *rege inconsulto* is termed *granting of an aid*, indifferently and promiscuously, as well as upon the *aid prayer* itself; for so are the books, which I cite unto you truly and punctually, of 3. Ass. pl. 1. 11. H. 4. fo. 39. 27. H. 8. fo. 10. in the which books the conclusion of the plea is, judgment *si le roy nient conseil*; and for the act of the court, the books in *terminis terminantibus* are thus, *et plicide fuit et habuit auxilium*.

AND therefore for Thorpe's opinion, that is in 28. of this book of Assise, fol. 39. *Turpin's Case*, you must either give it a favourable construction, or else you must bury it, and damn it under a heap of authorities.

THE case was, that in an assise the defendant pleaded the charter of K. R. by the words *concessimus et dimissimus*, and not by *dedimus, tenenda* by certain services, and not by any rent, and so prayed in aid. Saith Skipwith, the more natural conclusion had been, *judgment if the king not consulted with;*

with; which, no doubt, he meant, because there was in the charter neither word *dedimus* nor any rent: but, What was done? The plea was adjourned, *et interim fuer al Roy*, for the book is misprinted B. for R. which is easy to miss in the Dutch letter, for the R, is with the foot turned out, and the B. is with the foot turned in; but Brooke, in abridging it, hath it plainer, *sequatur penes ipsum regem*, and the other hath no sense.

THEN follows a corollary of Thorpe's, being a kind of voluntary of his own; "There is a great difference between the *aid* and the *rege inconsulto*; for in the *aid* you must plead to the king himself, but in the other not." This, if Thorpe meant thus, that in the case of the *aid* the king was in justice bound to take upon him the plea, whereas in the case of the *rege inconsulto* it is in his pleasure to waive the defence of the suit, and to grant a *procedendo*, he saith somewhat, for the *aid* is the more obligatory to the king; but if he meant, that in the case of the *aid* the plea shall be discussed in the chancery, and in the case of the *rege inconsulto* it shall not, but that the king's counsel shall be assigned to the party, and so to go on in the first court; then it is (let me speak with reverence) but about sun-set, for clearly it is no law.

FOR, FIRST, it is repugnant to the very case itself; for if so, then the court had not concluded *sequatur penes ipsum regem*, but to have denied the *aid*.

SECONDLY, The authorities are infinite against it, which are, beside the cases I vouched before this, 22. Aff. pl. 5. the same year, pl. 7. 39. E. 3. fo. 7. 7. H. 4. fo. 45. Aff. pl. 21. the same year, pl. 18. 45. H. 5. fo. 11. 21. H. 7. fo. 3. and infinite others.

IN all which books, upon the plea of *rege inconsulto*, the rule and pale of the court is the plea, or *de abundant fuer al roy*.

Now for the *writ* itself, it is the like case, but much stronger; for the writ doth absolutely close the hands of the

court; and then the subjects must have a suit that must be private or loyal: not private, *ergo* loyal; for that the suit should be in private to the king to have a *procedendo, absit verbum*; for God forbid that, upon the calling of mr. Attorney or mr. Solicitor, in the gallery, the king should determine the right of the subject; for wheresoever the law giveth the subject a right, it giveth a remedy in open court legally.

Two kinds of  
this writ.

It is true the writ, in the present case thereof, admits a subdivision: the one kind where it is purchased by the party, in corroboration of his plea, either of *rege inconsulto*, or of aid.

THE other is a writ which proceedeth from the case of the king's Attorney, and is substantive in itself, and not induced by the plea of the party.

I WILL give you the books of these. For the writ induced by the plea you have 8. Aff. pl. 16. 22. Aff. pl. 24. 40. Aff. pl. 14. 46. E. 3. fo. 19. 35. H. 6. fo. 44. For the other writ you have 21. E. 3. fo. 24. and  
— 1. R. 3. fo. 13. Arden's case.

Now to conclude this part, and to give the court a better light, I will put you the difference between the plea and the writ, which are three.

FIRST, The plea ariseth from the vigilance of the party to draw on the king to his aid; the writ ariseth from the providence and caution of the king to save himself, and likewise to protect the party.

SECONDLY, The plea must come before issue; for you shall never force the king to maintain the issue of the party; but it must come *tantumquam res integra* to him, to take his own issue, as is 7. E. 4. fo. ; but the writ may come any time before judgment.

AND, THIRDLY, The plea must be grounded upon some record that appears of the king's title, or at least upon some examination of *authorities*, such as the law allows; and this may be counterpleaded; but the certificate of the writ

is

is peremptory, and not to be counterpleaded :<sup>4</sup> but of that hereafter.

It sufficeth now that I have proved (if law be law) that upon the *aïd*, and upon the *plea* with the writ, and upon the writ without the plea; I say that, in all these cases, you must sue in the Latin court in *chancery*, and there plead with the king himself, *penes ipsum regem*; so that all that troubles us is no more but this, that when mr. Brownlow goes up Westminster-hall hereafter, he shall turn a little upon his right-hand, and all shall be well.

- Now if mr. Brownlow shall ask me, Whether the record itself in this court shall bein all these cases removed into the chancery? or, Whether a suit *de novo*? or, *What* shall be the course? I am not bound to read him a lecture what he shall do: and yet, lest you should be discouraged above measure, and think that it should be in the nature of a petition of right, which is a long suit, I will comfort you with some precedents of a more summary proceeding.

In the time of Philip and Mary, 3. and 4. between Jones and Ecks, in a *quare impedit* brought by Jones, the suit was stayed upon disclosure of the patronage to be in the king; the rule was given in this manner; *Et super hoc dies datus fuit partibus prædictis in Sti. Martini in statu quo nunc; et dictum fuit præfato Willielmo Jones quòd sequeretur interim penes dominum regem et dominam reginam: et super hoc prædictus Will. Jones venit coram rege in cancellaria et petit breve de procedendo; super quo quæstum fuit ab Ed. Griffith attorney regis generali, qui pro rege in hac parte sequitur, si aliud pro rege habuit aut dicere sciebat, aut potuit; quare dictum breve de procedendo præfato Will. Jones in eà parte minime concederetur. Qui quidem Ed. Griffith adtunc et ibidem nihil dixit, aut dicere sinit, aut potuit, quamobrem prædictum breve de procedendo eidem Willielmo in eà parte non concederetur. And so a *procedendo* granted. Thelike record in an action of trespass between Maurice and Hazard, of a house called the White Horse in Lynn*



Regis, brought in this court, which had been granted by king Hen. 7. to the town of Lynn Regis, with a rent reserved; and sir Gilbert Gerrard called to it in the chancery, and upon his *non dicet a procedendo*. The like 35. Eliz. between Gascoigne and Pierfon, in trespass in this court; the tenement in question was Ontobie; and sir John Brograve called to it, who gave way, and a *procedendo*.

Now for the minor proposition, Whether the king's title come in question? No man can contradict it; for the question will be, Whether mr. Michell hath disseised mr. Brownlow of his fee? Mr. Michell must justify the king's letters patents made to him for his life of the office of clerk to write the writs of *superfedeas*, together with the fees accustomed; then the main question of the title must be, Whether the king may erect this office? and, Whether the king shall have a perpetual inheritance to confer it when it falleth?

So that this is a title of exceeding importance to the king; for the ax is put to the root of the tree, which root hath three strings; first, matter of profit; secondly, matter of power; thirdly, matter of example or consequence.

FIRST, Matter of profit in the gift of this particular office; secondly, matter of power. Thus the question is, Whether the king, being head of justice and judicature, may not in his own courts collect into an office, and make a proper office for that which was *vagum quiddam*, and loosely and promiscuously executed and done by clerks before? Thirdly, Matter of example or consequence; for this leadeth to the overthrow, at the least, of ten letters patents of like nature already past, enjoyed, and settled, which I will now specify and enumerate unto you.

THE patent of *subpœnas* in the chancery, which formerly were written by all clerks that writ to that court, and was collected into an office in the 17th year of queen Elizabeth, and granted to George and Mark Williams.

THE *subpœnas* out of the star-chamber, which both the clerks, under-clerks, and attornies of the court indifferently wrote, were collected into an office, and granted to Cotton, 1. Eliz.

THE writing of *diem solvit extremum*, which is a legal writ, and for the subject as well as the King, which clerks of the petty bag did write, was collected into an office, and granted to Ludlowe and Dyer, 13. Eliz. 27. Martii.

THE licence of aliecription; formerly written by the clerks of the petty bag and the cursitor clerks, drawn into an office, and granted unto Edward Bacon, 13. Eliz. 23. April.

THE writing of the *supplicavit supersedas*, for the good behaviour of the peace; granted to sir George Cary, 33. Eliz. 1. Oct.

THE writing of letters missive to York, granted to Lerton, in the king's time, 14. June, 4. Jac.

THE writing of affidavits, drawn into an office, and granted to sir James Sutterton, 20. April, 13. Jac.

THE making of extents upon the statutes staple in queen Elizabeth's time.

THE making of commissions to the delegates, in appeals from sentence ecclesiastical, in queen Elizabeth's time.

• THAT famous erection and constitution of the cursitors for original writs, which was attributed to my father as a great service, in the beginning of queen Elizabeth's time, though afterwards it was confirmed by act of parliament.

THERE be more, but I will not be exact in enumeration. My lord, for my part none of all these, no not this of Michell's now in question, ever passed my hands; they went all either before me or beside me, but, by the grace of God, I shall be able to defend them; for now, mr. Brownlow, if you will overthrow all these, and lay open all these inclosures again, and become a kind of leveller, then we must look to you.

## ARGUMENT OF SIR FRANCIS BACON,

Now let the court judge, whether these be not a title whereto the king ought to be made a party, which is the only end and final cause of this writ; and so I leave that main part.

adly, Of the  
efficient cause.

Now do I proceed to my second part, which is to be the efficient cause of this writ, which I declared to be the king's prerogative.

THIS were a large field to enter into, and therefore I will only chuse such a walk or way in it as leadeth pertinently to the question in hand, wherein I will stand only on four prerogatives, which have a great affinity with that prerogative that did beget this writ; and in every of them I will conclude this cause *tanquam à fortiori*.

THE first is in the liberty and choice the king hath to sue in what court he will; whereupon I make this observation, that if the king may sue in what court he will where he is demandant, *à fortiori* he may draw a plea from another court where he is upon his defence.

THE second is the prerogative which the king hath of dilatories; whereupon I infer thus, that if the king in many cases may stay a suit simply and absolutely, *à fortiori* he may remove a suit to the proper court in his own case.

THE third is that slow motion and gradation which the law hath devised and introduced in that which is the subject of the present disputation namely, in the *aid* and in the *rege inconsulto*, which is this, the law hath devised that there must be a double *procedendo*; first, in *loquela* only; then, *ad iudicium*.

WHEREUPON I conclude, that if when there appears a cause of a *procedendo*, yet the suit shall not be at full liberty, but it is but as the opening of a double lock; *à fortiori* it is reason to arrest it at the beginning, before any cause of *procedendo* shewed.

AND the last is some precedents of extraordinary mandates of the king in matters of justice, in cases where  
the

the king was not the party interested; whereupon I will also conclude, that if the king, out of his great power of administration and regiment of justice, when he is not interested, may make such mandate, *à fortiori* he may do it where he is interested, and where his disinherison cometh in question. It is a great prerogative in opening of justice that the king may enter by what gate he will, and that the statute of *Magna Charta*, *communia placita non sequantur curiam nostram*, bindeth not the king; as if the king will bring a writ of escheat, which is merely a common plea, he may bring it in his court of the king's bench, which no subject can do. So is *Fitzherbert*, *Nat. Brev.* fo. 17. in his writ of right in London: so may he bring his *quare impedit*, *Ibid.* fo. 37. where you shall see the general ground is taken, that the king may sue that writ where it please him, according to the book of 46. E. 3. fo. 12. by *Finchedon*, and divers other books; so that *electio fori*, which otherwise is limited and distributed, where there are courts for several suits, is over the king's.

Now then I conclude, *ut supra*, that the king shall lead and not be led; and that if the king shall have choice of his courts upon his demand, much more shall he have it upon his defence; for, as the Civilian saith well, *in petitione periclitatur lucram, in defensione periclitatur damnum*, in the one case the king striveth for that he hath not, in the other case he is in hazard to lose that he hath.

For the second prerogative of mere dilatories, I will first put the case of the tenants of Northumberland. The tenants and inhabitants of Northumberland were so vexed by war with Scotland, that they could not till their lands; they were fain to betake themselves from the plough to the sword, *et curvæ rigidum fauces constantur in ensen*; whereupon the landlords brought their *cessavit*, because the land laid fresh, and they could not distrain for their rents and services. The king sends his mandates to the chancery, that no *cessavit* shall be granted; and to the judges

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judges of the common pleas, that if any *cessavit* come, they shall surcease the plea; and both courts hold it good.

IN 22. Ass. pl. 9. the king's writ came, reciting, that it was ordained by the king and the great men of the realm, that an assise brought against any that were in the king's service in France should be stayed; and certifying that the defendant was at Calais in the king's service, and commanding the judges to discontinue the assise; and obeyed, notwithstanding, saith that book, the statute of 1. Ed. 3. that neither for great seal nor privy seal the court shall surcease; for that was instant in respect of letters and consideration of favour between party and party, and not of mandates of state or upon legal interest in the king.

So I find a record in the exchequer, 17. E. 3. *Rot. Hiberniæ* 13. The citizens of Dublin sued Will. de Canall, who brought his writ of error in the king's bench of England. The king, disliking this tossing of justice upon the seas, sent his writ to the justices of this court, commanding *ut supersedeant in probatione errorum ad scētam Will. Canall versus cives de Dublin, et quod recordum et processus loquēte predictæ transmittant justitiariis Hiberniæ.*

THE like record I find 17. E. 3. *Rot. Hiberniæ* 37. between Jeffrey Greenfield and Jeanne de Tyrone, *ut supersedeant et transmittant*; and obeyed. It may be said, that these cases seem to be but a case of point of state; but then take this with you, that the eye of the law of England ever beholds the king's treasure and profit as matter of state, as it is indeed;—they are the sinews of the crown.

THE case in 4. E. 3. 19. and again fo. 21. is very notable, taking it with all the circumstances. Sherwood being attainted in redisseisin, and a *capias pro fine regis* awarded, was sued also in trespass, and a *capias pro fine* was awarded likewise in the trespass; whereupon a mandatus by privy seal came to the court, reciting the conviction

viſion of the rediſſeiſin, commanding the court to grant a *ſuperſedeas* upon the *capias* in the treſpaſs, for that the king would not that Sherwood ſhould be moleſted or vexed with any proceſs in the king's rights; and yet you know well, that upon the *capias pro fine* the defendant ſhall be in execution, as well for the party as for the king. When this mandate by privy ſeal came, the judges were in doubt what to do; and Crompton, the prothonotary, ſtept forth and ſaid, that heretofore the like writ had come in the time of Forſtecue, chief juſtice, who had diſobeyed it.

THE judges, in the abſence of Markham, then chief juſtice, began a little to bristle, and ſaid, that it was not honourable for the court to waver, and to do one thing to-day and another thing to-morrow, and therefore they would do nothing till my lord Markham was preſent, who was judge in Forſtecue's time, and he would ſit with them the next term, and by the grace of God they would do according to their place and conſcience. In Trinity term following, after this ſtorm, Markham quietly, *ſine ſtrepitu*, granted the *ſuperſedeas*, according to the king's command, and there is an end.

Now for the third point, it is but a note how wary the law is, after it hath taken notice of the king's title, to proceed, and therefore there muſt be a duplication of the *procedendo*; firſt, *in loquaci*; then, *ad judicium*.

FOR although in the removing of the ſuit in the chancery there be no matter at all ſhewed for the king, yet the law giveth it not over, but is content there be a *procedendo* granted; with a reſtraint nevertheleſs that the court ſhall proceed as far as judgment, and no farther, and ſtill lieth in wait to ſee what will come of it: and if upon iſſue or demurrer it finds any liſe in the caſe more than appeared in the firſt, the king may forbear the granting a *procedendo ad judicium*; nay in the mean time, if the defendant plead in chief, in maintenance of the king's title, the king's counſel ſhall be aſſigned to him for his better ſtrength.

Asto the last branch, that is, extraordinary mandates, legal in suits between party and party, you may see two notable cases to one and the same intent; the one of 1. E. 3. title *Crown*, pl. 125. the other 7. H. 6. fo. 31. where the king gives a direction to the judges what they should do, and prejudices their judgment: for that question being touching the custom of London of waging battell (for which citizens are not so fit); which custom, as all other customs, is subject to the judgment of the court whether it be lawful or no; the king leaveth it not to the court, but by his writ commands the judges to allow this custom, and so upon the matter tells them what they shall judge.

BUT of all the records that I have seen, that of 3. E. 1. Hil. Rot. 52. is most memorable, and worthy to be a kind of phylactery about the garments of all the judges. There was an assise of *darrein presentment* brought in the court of Chester by the prior of Kirkennett against Alice de Bello Cam. G. guardian of the body and land of Hamond de Macy, and it was of the church of Bonden. The king directed his writ to Reynold Gray, then justice of Chester, reciting, that whereas the said assise did depend before him, that the king did hold it fit to send down to the said justice there, from hence, *à latere regis* (for so are the words of the record), some discreet and circumspect person that might assist him in the taking of the assise; commanding him to surcease until three weeks, to be accounted from Midsummer then last past, by which time the king might send him, such a person as he might think fit.

NEVERTHELESS the justice, in contempt of the king's commandment, took the assise before the term prefixed by the king's writ. And as it should seem by the record, this Gray was a kind of popular justice, and was incited and blown up with the speeches of the people about him, who murmured, and said, except he would go on according to the law, they would serve nor appear no more at any court; and so, with great triumph, he took the assise.

Upon

# IN A CASE DE REGE-INCONSULTO.

Upon this, the record of assise by *venire facias* came into this high court of king's bench; and now I will read the words of the record itself, which I hold so memorable, that you may see what your predecessors did.

*ET quia prædictus justitiarius non habet aliquam jurisdictionem vel potestatem cognoscendi in aliquâ loquelâ vel capiendi aliquam assisam nisi per prædictum dominum regem et ad ipsius voluntatem, et compertum est per recordum prædictum egram justitiariis domini regis, quod non obstante mandato domini regis quod ad captionem præfatæ assisæ non procedat usque ad diem Sancti Johannis Baptiste præterit in tres septimanas tamen ad captionem ejusdem assisæ processit, videtur curiæ quod idem justitiarius in capiendâ assisâ fecit quod de jure non potuit, maximè cum non fuit, nec esse potuit justitiarius ad placitum illud, contra prædictum mandatum Domini Regis, ante prædictam diem; et ideo consideratum est quod captio præfatæ assisæ non præjudicet quoad potuit, et sit in statu ac si prædicta assisâ non fuisset.*

I WILL conclude with an higher kind of assistance than the justice of Chester, by some person from Westminster, and that was an assistance of the justices of this court, by the chancellor and treasurer of England, and that at their own request. The record is this, and it is 31. E. 1. Rot. 46. 47. Henry Newbery levied a fine to queen Elinor of certain lands in the counties of Somerset and Dorset; the steward and bailiff of the queen entered, and encroached upon a great deal of other lands that passed not by the fine. Newbery sat quiet as long as queen Elinor lived; but as soon as she was dead, he questioned the bailiff in this court, and made petition to the king for restitution. The judges discerned somewhat (as it seems) that the party had right; but yet, taking occasion by the insufficiency of some inquisitions in the form of taking them, they thought good to cease, and conclude thus:—"The justices dare not  
" presume to proceed to their award without a special com-  
" mission



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“mission of the king, which might be to them a warrant  
“of their award, which nevertheless they would not should  
“be turned to example in other cases.”

THEREUPON comes a privy seal to sir William Hambleton chancellor, and the bishop of Chester treasurer, commanding them to handle the business, and to assist the judges; and according to their opinion the court gave the award.

Of the  
material cause.

Now I proceed to my third part, which is, the matter of this writ, which is, the king's loss, or that is the material cause of this writ.

Now for the king's loss, it may be in present, it may be in future, it may be direct, it may be indirect, and by consequence it may be more, it may be less free; wherein I will shew you that which is worthy the observing; which is, how sharp-sighted the law of England is on the king's behalf to preserve his right from loss: for as it is the quality of a sharp eye to see small things, and things afar off, so you shall find that there is no loss to the king so little, or so remote, but that the law fetcheth it in by this writ; nay, it goeth farther than the natural eye; for the natural eye never sees but in a strait line, but the eye of the law will see the king's loss in a crooked line, be it never so oblique or collateral.

In this I will now shew you a cloud of authorities, *nubem testium*; nevertheless, because I love not confusion, I will order them thus: I will make unto you a *scala domini regis*, that is to say, a scale or gradation of the king's loss, beginning with the great, and so descending to the less, because of that there is more doubt; and so put a case or two of every kind.

THE degrees therefore of the king's loss are in number nine, in every of which cases this writ lies.

THE first is, where the king is to lose possession, or prevent profit.

THE

THE second is, where the king is to lose a reversion; and that of two natures, either a true reversion, or a reversion only by conclusion.

THE third, where he is to lose feignory, fee farm, or rent reserved.

THE fourth is, where he is to lose by way of charging his possessions with any rent or profits, collateral or otherwise, by way of warranty or recompence.

THE fifth is, where he is to lose any title, possibility, or contingency.

THE sixth is, where the king is to lose any royal patronage, donative, or gift of office, which is our case.

THE seventh is, where his title is any where prejudiced, failed, or blemished, or an evidence raised against him, though he lose nothing for the present.

THE eighth is, where the king is to lose upon the balance, that is, where he hath benefit two ways, the law will ever protect the greater benefit against the lesser, but not the lesser against the greater.

THE ninth, and last. When the king is at no loss at all, but only his charter or patent is questioned, though the interest be wholly out of him; wherein though Mr. Serjeant Chibborne did labour and argue exceedingly well in maintaining that position generally, yet I, for my part, will not defend that point; but, with deference, in every of these I will put some cases the best and most select in the law, because I will not overlay you with numbers.

I WILL begin therefore where the king loseth possession or profit; and I will take the weakest and superficial kind of professions and profits.

THE prior of Barnsey (a) was sued for certain land, and pleaded to issue; and at the day when the jury appeared, the prior brought a writ (as we did in this case) to the justices, purporting, that whereas he was impleaded before them of certain lands, the king gave them to understand, that all the possessions of the said prior were seized into his

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hands, because he was an alien of the obedience of France, requiring therefore so circumspectly to deal and behave themselves, that they do nothing that may turn to the king's damage.

HEREUPON, although it was pressed by the plaintiff's counsel, that the court might proceed as far as verdict, because the writ imported not that they should stay, but only look about them; yet says Stone, justice, "the king hath given us to know that the lands are seized into his hands, and therefore we cannot hold plea between the prior and you of those lands which are in the hands of the king; as who should say, If the king give us leave, yet the law giveth us not leave; therefore," saith he to that inquest, "God be with you;" and to the party, "Sue to the king."

So here we have the case of this same surface, this superficies of title which the king had by way of pernancy of profits in case of the prior alien, and yet good ground of this writ.

IN a *præcipe quod reddat*, at the day of the summons returned, the defendant brought a writ out of the chancery, reciting, that the land in plea was held of the king by knight's service, and that such a one, the king's tenant, died seized thereof, his heir within age, whereby the lands were seized into the king's hands, commanding the judges not to proceed *rege inconsulto*; hereupon the tenant nevertheless was demanded. Saith Jenney, "To what purpose demand you him? For if he come not, you cannot have a *grand cipe* upon his default; but you ought to sue to the king." Saith *Littleton* and *Choke*, judges, "He must be demanded to continue the process."

AND the like law is of a *livery* in 11. Hen. 7. fo. For though it be questioned there, whether the writ of dower be well brought, yet of the aid no doubt is made; but I will grant that the king's interest may be so feeble as the suit shall not stay: and that I learn in the case of

11. H. 6. fo. 13. a man lets land to an abbot for years, and an assise was brought against him of the same land; and the abbot said that the king had seized his goods and chattels for dilapidations, and had also taken his goods and chattels into his protection; in this case aid was denied: and if the like matter were contained in the writ *de rege inconsulto*, the court, in my opinion, needeth not to stay for the seizure; for dilapidation is matter of ecclesiastical consequence, and the taking of the lands and goods into the king's hands by way of protection, is no seizure to the king's use; so that neither of them are such possessions in the king as the law esteemeth, no more than in the case of the outlawry in a personal action. And if any assise be brought against one that is outlawed, and the king reject by his writ the outlawry, and that thereby he takes the profits of the lands, and thereupon commands the court to surcease, in this case I say the court ought not to surcease, for it is no such loss to the king, as the law values; for since the party may discharge the king's interest by feoffment, *a fortiori* it ought not to be any delay to an issue right.

MARRY, I am of another opinion in the case of the lunatic, although the king hath but the profits upon account, because of the trust the law reposeth in the king for the party.

To proceed to the second degree, where the king is in reversion: if it be a reversion *de facto*, in state of that I will put no cases; for, *perspicua vera non sunt probanda*. But for the reversion by conclusion, it is a juror's case, and therefore fit to have authorities vouched in it. The difference, therefore, is taken in 24. E. 3. fo. 1. and 8. H. 6. fo. 25. and 1. H. 7. fo. 28. that if a man will plead, that the king, by his letters patents, did let unto him for life, or plead that a lease for life was made unto him, the remainder unto the king, and thereupon pray aid, he must in these cases shew letters patents or a deed inrolled; but if he

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plead positively, and substantively, that he is seised for life, the reversion to the crown, and prayeth in aid, he needs shew nothing; because, although the king had nothing before, he is entitled to a reversion by conclusion.

THIS is a wonderful strong case, that an imaginary reversion, by matter of falsity gained hanging the writ, should have cause of aid, and then so the mischief; for it may be a delay in all cases in the world; no tenant in assise, or other real action, but may keep the demandant in play by this means, and make him plead with the king; yet so tender is the law, that it will not permit this imaginary right of the king to be questioned, without the king be called to it.

COME we now to the third degree of loss, which is when the king loseth feignory, fee-farm rent, or rent reserved. Take for that the case in 35. H. 6. fo. 46. the case between the bishop of Winchester and the prior of St. John of Jerusalem: there, in conclusion and judgment in the case, you shall see the difference notably taken by *Prisot*, that it is not simply a feignory or rent reserved that shall give cause of aid of the king, or ground of a writ, or plea of *rege inconsulto*, for that indeed were a mischievous case; for all the king's tenants in England or fee-farms might be in case of aid: but if the title of the plaintiff be paramount before the commencement of the king's feignories or rent, whereby the king may be defeated of his feignory or rents in whole or in part, by the eviction of the land, and so at loss, there the aid or the writ lieth, and not otherwise: for it is indifferent to the king who be his tenants, so they come all under his feignory or rents.

UPON the like reasons is the book in 31. Ass. pl. 27. where it appears that, if rent be reserved to the king by a lease, and the lessee be bound to bear all charges, out payments, and allowances, and a corody (as the case there was) is demanded, there the rent shall not give cause of aid; because, although he be evicted, yet the lessee is to pay his  
rent

rent howsoever, and so the king hath no loss. But if the king had covenanted to have borne out the charge of such incumbrances or out-payments, it had been otherwise.

To proceed to the fourth degree, which is, when the king hath loss collateral. For the warranty, where it is expressed with a clause of recompence, whether in lieu of voucher or of damage, the learnings are so clear, that I will not put the books that the suit shall be to the king. As for the word *dedi*, that it should be a warranty in the king's case, whereas the proper word *warrantizabimus* will not serve without clause of recompence.

You shall, I mean, learn to doubt with books against the opinion of 1. H. 7. ; and for the collateral charge you may see the book, which is 3. Aff. pl. 1. where an assise was brought of a rent, and the defendant shews that he had tenancy put in view of the lease of the king, and therefore that he conceiveth that there might not be a proceeding without taking counsel of the king : and thereupon the book says, " Note, that in this case the aid is granted of another thing than *that* is in demand ;" and so no doubt is it of a common, and the like.

THE fifth degree was title, possibility, or contingency ; as if the king give land upon condition, and a *præcipe* be brought of this land, upon a title paramount the king's condition, &c. I hold in this case the king may stay the proceedings, and bring the suit before him in the chancery, for the safety of the condition. Sure I am, the case in 39. E. 3. fo. 8. is a much harder case, where dower was brought against the guardian, who pleaded that the ward's ancestor held other lands of the king in chief, and died, whereby the king seized and granted unto the tenant *usque ad plenam ætatem hæredis*, and demands judgment, if *the king not consulted with*, &c.

In this case, upon debate, the aid was granted ; and yet there was no rent reserved upon the patent, neither was there any remainder of the king in the estate, for it was

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granted until full age ; and yet, because there was a possibility, that if the heir did live till full age he should sue his livery out of the king's hands, it was sufficient ground for the aid.

COME we now to the sixth degree, which is, where the king may have loss in respect of his patronage or gift of office, or the like.

FOR this you may see the case in 38. E. 3. fo. 28. b. the abbot of Lyncull's case, where a deanry of the king's advowson was to be charged with an annuity, and a *scire facias* was brought against the dean upon an annuity against his predecessor. The dean said, that the king was seised of the advowson of the deanry discharged, of the annuity, and that he holds of the collation of the king ; and so prayed aid : and after much debate, and divers objections that the writ of *scire facias* was in the nature of execution, and so no time to pray in aid ; and again, that the predecessor had aid in the former suit, and so no aid should be in the latter ; yet nevertheless aid was granted ; and yet this was no more but a disvaluation of the king's patronage.

BUT 4. H. 6. fo. 1. is a case far more remote. *Pipe* brought a writ of entry, and the defendant said, that he was parson of the church of Dale, of the presentment of the duke of Norfolk, and that the land in question is part of his glebe, and that the bishop of Norwich is ordinary, which bishopric is vacant, and the temporalties seized into the king's hands, and so remain ; and prays in aid of the duke of Norfolk, as patron : and as to the ordinary judgment, *whether the king not consulted with, &c.* the book is left at large, for they proceeded not ; and yet the seizing of the temporalties had no affinity with the jurisdiction of the ordinary ; but, because it did but touch or coast upon the king's right, and because the king is supreme, and the see of the inferior ordinary was void, the court was at a stand.

Now for the office. The best case in the law is 2. H. 7. fo. 7. where it seems the stander-by saw more than they that played ;

played; for the court erred, and the reporter was in the right, as appears by the adjournment of the cause before all the judges of England, who overthrew the former judgment, and confirmed the law according to the opinion of the reporter.

THERE the case was, *Crofts* brought an assise against Edmund Kemperden, and made his plaint of the office of the keeper of the park of Woodstock, and the porter's place there, and made his title by the letters patents of king Ed. IV. The defendant intituled himself by letters patents of king Hen. VII. who granted to him for life; and prayed in aid of the king; and the judges denied the aid: but the same year, fo. 11. before all the judges, the aid was granted.

PPLACE these two books together, and you shall find it amounts to this, that there were two objections made unto the aid. The one, because there was no clause of recompence or any rent reserved; the other, because both parties affirmed the king's title, and so the king was at no loss. To the first the answer is made, that the king, in the present case, hath loss, for that he hath in effect the reversion of the office, that he may grant it when it falls; for (as in *Nevill's* case) the king may have an office to grant, but not to execute. To the second answer is made, that it might be, the first patent was forfeited, (the case being of an office which is subject to a forfeiture) and that thereupon a seizure was made by the king, and upon that seizure the latter patent was grounded, and to the king's act might come in question; and to justify that, therefore, the king must be no party.

AND if you will have a case, not of an office itself, but of an incident to an office (as the other case is of a fee) then you may take the case of *Crofts* and the lord Beauchamp, 10. H. 7. fo. 38. where the plaint being of a house and land, the tenant shewed a covenant, by deed inrolled, of a grant of an office of forester in tail, the remainder to king Edw. IV. the truth being, that the house and land in



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question were incident to that office ; and so prayed in aid : but there an averment was wanting ; and upon that reason only aid could not be granted : but if it had been alledged by the plea, there had been no colour, but the aid should be granted, as well in respect of the incident of the office, as of the office itself.

To proceed to the seventh degree, which is, where the king loseth nothing, but only his title is prejudiced and blemished, and an evidence raised against it. for *that* there is one case, *instar omnium*, the famous case of 2. R. 3. fo. 13. b. *John Hunston* brought an action of the case against *John bishop of Ely*, for claiming him to be his villein, and for lying in wait to seize him ; and the bishop justified, that he was his villein regardant to a certain manor of his see, and thereupon they were at issue ; and hanging the plea, the bishop was disabled by parliament, and his temporalties forfeited to the king, who seized them. *Hunston* went on, and prayed the *nisi prius* ; whereupon the king's attorney brought this writ, reciting the whole matter, and how the temporalties were seized into the king's hands, commanding the justices not to proceed *rege inconsulto*. What came of it before all the judges of England ? It was agreed, *unanimi consensu*, that the writ should be obeyed ; for they said, that although the king upon the action of the case did lose nothing, because the damages did trench but to the party, yet nevertheless if the issue should be found for the plaintiff against the king, that he was not the bishop's villein, it might be a great evidence against the king's title, for the manor itself which was in his hands ; so as the court kept aloof, and upon this oblique and remote consequence of prejudice to the king, the court did surcease.

THE same learning you shall find in actions of like nature, as trespass, or *quare impedit*, wherein the king loseth nothing for the present, but nevertheless his title may be foiled ; and although the books do vary in this point, yet you shall find the more constant resolution as I say.

And

And for the trespasss, take the book 9. H. 7. fo. 15. Bryant and Fairfax; and 27. H. 8. fo. 28. by Fitzherbert, "clearly there shall be no proceeding without making a party; no, not in trespasss." And the case of 5. H. 7. fo. 16. of the *quare impedit*, which seems to be to the contrary, is justly controlled and questioned by the reporter; but where the king may receive prejudice in his title, not in the same land, but other land upon the same title, it is another case. As if there is land upon the title of the lord Dacres, or the lord Latimer, &c. whereof part is in the crown, and part out of the crown, in fee-simple, without rent; if an assise be brought of the land which is out of the crown, without any rent received, there certainly lies no aid, because it is not of the same thing; neither can that plea between two subjects ever be brought into the chancery; but whether some kind of writ of this nature may not be brought to stay such a suit, you shall give me leave to doubt.

Now to come to the eighth degree of loss, *when the king is to lose any balance*; it is comparative, where the king hath benefit on both sides, but yet with a disproportion.

I WILL cite only that notable case which is 1. H. 4. fo. 8. where the case was, that the king had granted the office of measuring of linen cloth and canvas sold between foreigners unto John Butler, taking as Robert Sherwood took; there was an attachment upon prohibition against the mayor and sheriffs of London, for not putting him in possession, according to the clause in his patent: the defendants alledged, that they held the city of the king in fee-farm rendering rent; and that, if this office should take place, their farm should be impaired; and so pray aid of the king. In this case they were ousted of the aid; for that on the one side, if the office should stand, yet they should pay their fee-farm nevertheless; and on the other side, if the office should be overthrown, then the king's reversion and gift of the office should be lost, which should be his

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disherison, which was not equal : besides that, they were upon contempt (which is also against the king) ; and so the aid justly denied.

So if you alter the case in 1. H. 7. and put it that the king granted an office of keepership of a park by several patents, and upon the one patent the rent is reserved, and upon the other none ; I say, that in this case, whethersoever of the patents be antienter or later, the patent that hath the rent shall have the benefit of the aid, in destruction of the other, and not *à converso*, for it is the king's loss that sways the aid.

AND for that I can shew a notable record, in a case between the bishop of Ely and the city of Norwich.

As for the last degree, which is, if the king's charter be questioned, without any manner of loss to the king, that in such case the king must be made party ; it is a reverend opinion, and supported with a great deal of authorities ; and no doubt it grew from that ancient maxim in Bracton, *In chartis regis non præsumant justitarii regis disputare, sed tutius est ut expectent sententiam domini regis* : and certainly there are a great number of books on it, whereof the most direct are, 30. Aff. pl. 5. 2. H. 4. fo. 19. 2. H. 4. fo. 25. 33. H. 6. fo. 16. ; for as for the books of 38. Aff. fo. 16. 39. E. 3. fo. 11. and 25. Aff. fo. 8. they may receive an answer, and no more perplex.

BUT I do take the law to be otherwise this day, except it be in charters which are of a higher nature than charters of lands or interest ; and this error grew upon a misconstruction of the statute of bigamy ; but because this is beyond the case in question, therefore I will not stand upon it : and here I conclude any third principal part.

cause.  
e form of  
writ.

Now come I to the last part, which is, *the form* of the writ, which doth require your attention as much or more than the former, because in that part will fall the removing of all the evasions and subtrefuges which have been or can be used on the adverse part.

THE writ hath, as I find in the beginning, two parts ; the recital or certificate, and the precept or mandate. For

the

# IN A CASE DE REGE INCONSULTO.

the first of these, I will divide that which I shall say into five points.

Five points.

FIRST, I will grant that there must be a recital of the king's title in the writ.

SECONDLY, I will prove that the king's title recited need not to be grounded upon any precedent record.

THIRDLY, I will prove that the certificate of the writ concerning that title, is peremptory.

FOURTHLY, I will prove that you must never question the king's title upon the writ.

AND, lastly, I will answer some weak objections that have been made, although the affirmative proof doth in itself take them away.

FOR the first point, I will grant that which I take to be law, which is, that the king must disclose his title specially in this writ; and therefore, upon this I hold it the proper place to tell you what writs I think are insufficient.

First point.

FIRST, If the writ be *ad idem*, that is, doth not sufficiently denominate the record that should be stayed, then there is no certainty, and so it cannot bind; as if the assise being of the fee only, the writ hath recited it to be of the office.

SECONDLY, I do confess, that among all the precedents of this writ which I have seen (which are very many), I never found any of a general writ, but that the king's title was ever expressed by way of recital; no writ of *certis de causis vobis mandamus quod nullatenus procedatis*; no writ *pro eo quod nos cogitamus quod in prejudicium nostrum caderet, vobis mandamus, &c.*; but the subject is fairly dealt withal, and the king's title is ever disclosed; not because the court shall judge of the title, as I will tell you by and by, but because the party may be apprized how he may make his suit to the king; for it were a hard matter to say, "Sue to the king," and that the subject should not know upon what ground to sue; that were to leave him in a wood, and not in a way.

THIRDLY,

THIRDLY, if the king's title be referred to a record, and the record destroyed it, then the court is not tied by the writ, as appears in Bedingfield's case, 18. Eliz. (a). In a by-point, where the king's title was grounded upon an office recited in the writ, and the office extended not to divers lands comprised in the writ; there the original record, which the writ voucheth, governeth the writ itself, and destroyeth it for so much as is not contained in the office.

AND LASTLY, I will not deny neither, but that if all the king's titles be admitted both in law and fact, and all the words of the writ received for true, and yet the king appears to be at no loss, that in that case the court is not bound to stay; as in the case that I put to you in the third part of my division, if the writ should be grounded upon an outlawry in a personal action, or seizure for dilapidations, or the like.

Second point.

FOR the second point, that it needeth not that the king's title laid in the writ should be grounded upon any precedent record, as an inquisition, fine, or the like; but it is enough to recite letters patents of grants subsequent to the king's title, without going higher; and I think no man who is learned will deny it.

PUT the case, the king is seized in *jure coronæ ab antiquo* of the honour of Windsor; will any man say, that if the king grant letters patents unto J. S. of part of the demesnes thereof, and an assise be brought against him, and there comes unto the justices a writ reciting, that whereas the king was seized in right of his crown of the manor of Windsor, in his demesne as of fee, and by his letters patents granted to J. S. such a close, part of the demesnes thereof; and whereas nevertheless the said J. S. is drawn into plea by assise before you, *ideo vobis mandamus quod nobis inconsultis, &c.* will any man, I say, deny but this is a good writ, without vouching any original record of the king's title to the honor of Windsor?

## IN A CASE DE REGE INCONSULTO.

IN like manner, if the king shall recite in this writ his title by prescription to grant the office of *custos brevium* in the common pleas, or the like, is not this a sufficient shewing of a title? *à multo fortiori* in our case, where the letters, patents are not extracted out of any actual possession precedent in the king, or out of any special prescription, but out of the fountain of his prerogative, and the potential part of his crown, which is *sine patre*, so as you must have this *form* of writ or none, for there can be no record precedent, nor any prescription of that which is merely created; and therefore, the difference that hath been spoken of between the old office and the new is idle, for the writ must be as the case is: if it be an ancient office, you must alledge prescription; if a new, you must alledge the power, as we have done. Now to say that the king cannot grant or erect any office *de novo*, no man, I think, will be such a plebeian (I mean both in science and honour) as so to affirm; I will cite no books for it; you have the book of time, which is the best book, and perpetual practice.

IF the king *will* erect a county palatine (which is a little model of a monarchy subordinate), what a number of offices are incident to the same, and yet all *de novo*.

IF the king should conceive Cornwall to be too far off to fetch their law from Westminster; and therefore would erect a king's bench and common pleas there, and create likewise clerks and prothonotaries, and assign them the same fee, or half the fee that is received at Westminster, all these are offices *de novo*.

AND in many of these cases, if any such officers be disturbed (I mean of so many as the king hath ordained to be in his own gift), the defendant may have aid of the king, or the plea of *rege inconsulto*, or this writ; and yet in none of these cases can the king's title be founded upon record or prescription, because the office is new created. Neither is this the case of new offices  
alone,

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alone, but the like reason is of patents of privileges for new inventions, and upon patents of fairs, markets, leets, liberties, and the like; upon all which there may be and are reserved valuable rents. In all which cases, if they are drawn in question, you shall have aid, or this writ; and yet in none of them you can alledge either possession in the crown, or precedent record or prescription; because they were never *in esse* before the king's grant, but issue out of the potential power of the crown, being put in act and executed by grant subsequent.

AND for the leet, you have the very case in 24. Eliz. fo. 6. where an action of the case was brought by the lord of the leet against J. S. for interrupting him to take a mark in money, which appertained to him by reason of an amercement in his leet. The defendant pleaded a grant by letters patents from the king, with reservation of five pounds, to be paid into the exchequer; judgment, *whether the king not consulted with, &c.* This is our very case; there it was between an ancient leet and a leet newly created; and adjudged *there* that the suit should stay, and that it should be tried by suit with the king.

FOR the third point, that the certificate of the writ is peremptory, and the court is concluded to believe it, the difference is plain to him that can or will understand it, that in the plea *rege inconsulto* it sufficeth not the king's title appear only by way of allegation, except the party maintain it by record, or the court be apprised by the examination of the escheators, or commissioners; but otherwise it is upon the writ, the certificate whereof is peremptory. For this the case is in 20. Eliz. fo. 10. where a *scire facias* was brought to execute a fine, and the tenant said, that he held the manor of the lease of the king for life, the reversion to the king; and prayeth in aid, and sheweth forth no letters patents. And the court

court was not a little in debate, whether this amounted to such a plea as gave the king a reversion by conclusion, whereby he should shew nothing; "but," saith the book, "to stint the strife, there came a writ out of the chancery testifying the lease; and there was an end."

To the same purpose, the case is notable in the 22. of the book of Assise, fo. 20. An assise was brought against the countess of Kent and John Fitz-Edmunds her son: and first, after some exception to the writ about the stile of *countess*, the defendant pleaded that her husband held the land in chief of the king, and died, her son within age; whereupon the king seized, and let unto her during nonage; and demanded judgment, *that the king not consulted with, &c.*: "but," saith the book, "she shewed nothing; but after there was a writ brought out of the chancery, reciting the seizure, with a clause of *rege inconsulto*; and thereupon the court awarded the plaintiff should sue to the king."

So in the case 11. H. 4. fo. 39. where in dower of Kent, the tenant pleaded the seizure, *and if the king not consulted with, &c.*; "but the court gave no heed to it" (saith the book), "till the baron of the exchequer came, and brought in the seizure in his hands, and thereupon the court awarded a suit to the king;" but for the escheator, he must give oath of the seizure, and the counsel must shew this warrant; so as to the plea there must be a verification, but the king's writ must be believed.

AND to conclude this point, I will put the famous case of *Arden* and *Darcy* unto this special point: An action of waste was brought by *Arden* against *Darcy*, and *Darcy* pleaded the attainder of *Arden*, and the queen's grant, reserving rent; *Arden* replied that there came to the king, by the attainder of his father, only an estate for life; *Darcy*, after special verdict and argument, obtained the writ of the *rege inconsulto*; whereupon *Arden*'s counsel spake, and alledged that the queen could be at no loss,  
for



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for that if the tenant for life granted his estate, rendering rent, the lessor recovered the waste he should hold charged: but the judges said, "The queen hath certified us by her writ, which is matter of record, that she shall be at loss if this action proceed; which we ought to credit;" and so gave the rule, that Arden should sue to the queen if he would.

Fourth point.

FOR the fourth point, that the title of the king, which is in our case, "Whether the king may erect the writing of the *superfideas* into a new office? or, Whether Brownlow have right to it as belonging to his office of protonotary?" cannot be handled upon allowance of the writ, is without all colour or shadow.

FOR, first, it is *ex diametro* contrary to the intent of the writ; for the intent of the writ is, that this question shall be tried in a suit in chancery with the king; and now, under pretence of arguing the writ, you will enter into the title; this is to enter by the window, and not by the door; and that this may not be, there are infinite authorities.

As, first, you may see in 22. Assise, fo. 20. the countess of Kent's case (mentioned before), where this writ was brought, reciting, that the king's tenant had died seised upon a gift in tail from the king, and that there the king had seized for wardship. Saith *Pookes*, that was serjeant for the plaintiff, "Since the king's charter of gift of entail, the plaintiff hath recovered by judgment against the tenant in tail, and so prayed the assise." Saith *Hill*, justice, "That shall serve you; so title, when the king hath sent us his pleasure; therefore sue to the king."

So in 24. Eliz. *Brooke, Aid de Roy*, pl. 51. in a writ of entry against an infant, the tenant saith, that his ancestor had certain lands, held of the bishop of Durham by knights service, whose temporalities are in the king's hands; and shewed letters patents of the wardship, and prayed his aid. Saith *Wilky*, "He should have demanded  
"judgment

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"*judgment if the king not consulted with, &c.*; then the  
 "demandant would have pleaded, that the lands were  
 "held in focage in gavelkind, and not in knights service;  
 "and further would have pleaded, that they were not  
 "comprised in the patent;" but the court rejected the  
 plea, because it went to the title.

So 33. H. 6. fo. 2. *Danby* gives it for a rule, that  
 whensoever a man hath a patent of the king of certain  
 lands, and assise is brought against him of other lands,  
 and he prays in aid, *nient comprise* is no counter-plea  
 to the aid; and yet it seemeth, that the patent by this  
 is confessed and avoided; and that it is not *ad idem*, but  
 should be discussed in the other court. The same is  
 affirmed by Fitzherbert clearly; for so are the words,  
 "that upon the plea of *rege inconsulto*, grounded upon letters  
 "patents, *nient comprise* is no plea." 27. H. 8. fo. 28.

So in 37. H. 6. fo. 32. the rule is given, that if in  
 an assise the defendant plead, that such a one let unto  
 him the manor of S. for life, the remainder to the king,  
 and the plaintiff will say that he that let the land had  
 nothing in the land; or, that the king took nothing by  
 that lease; that shall not be tried in the first court, but  
 in the chancery.

So in 7. H. 4. fo. 7. debt was brought upon a bargain  
 and sale of goods, and the defendant said, that he bought  
 the goods to the use of the king, and prayed in aid;  
 and the plaintiff would have counter-pleaded, that they  
 were bought to his own use, and not to the king's; but  
 the court ousted him of that plea, for that shall be tried in  
 the chancery.

IN 38. Eliz. fo. 14. there the order of pleading and  
 trial in the chancery is delineated and described in this  
 manner:—When the plea comes into the chancery, first  
 the point shall be tried, whether the king be interested  
 or no; which the books call sometimes the cause, and  
 sometimes the warrant; and then you shall proceed to the  
 title,

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title, and so to issue or demurrer; and if to issue, a *procedendo ad capiendam inquisitionem tantum*, &c.; and if upon explaining the matter in the chancery (as the books call it), it fall out against the king, a *procedendo* shall be awarded in the nature of a command; and if it fall out for the king, there shall be a *superfedeas omnino*, and the court shall say to the parties, *allez à Dieu*.

NAY, further, the book of 8. H. 7. fo. 11. sheweth the learning notably, that if the plea be once in the chancery, although it be upon insufficient cause, the title shall be examined there for the king, and it is no error; so much regard the court had to the shadow only of the king's title, and the dignity of the court of chancery.

— THEREFORE I conclude, that if in our case mr. Brownlow will say, that the king nothing had in the office or fee to grant, and so the writ maketh no title for him; mr. Brownlow knocketh at the wrong door, for *that* he shall alledge in chancery.

**Left point.** FOR the objections: First, it is a mere cavillation, that because we have declared of a *new office*, and an *old fee*, that upon this the court is bound to take notice that the king hath no title.

FOR, first, this goeth to the title, and therefore cannot now be questioned, as I have proved before.

AND, second, who knows not, that by *the same fees* are intended *the like fees*; which is the same in predicament, viz. in quantity; whereof I might put you infinite trivial cases that every mootman knoweth, that *idem redditus* shall be *similis redditus*, and why not *eadem feoda* be *similia feoda*: but I suppose that mr. Attorney that then was, thought this the fittest and most honourable form of penning the patent; because it doth point out and demonstrate that the king raiseth no new charge upon the subject; and besides, most of the precedents of the patents which I recited before, are penned in the same manner.

As

As for the second objection, which is more of clamour than of argument, and rather to be chastised than confuted, "that by this means all suits may be stayed upon a "supposed right of the king's;" this is, I hope, at an end. You see that this writ is no delay, but a bringing of the plea to the proper court. And the very same may be said of the praying aid, for affirming the reversion of the king, without any thing shewing; which may be done in all assises of lands and tenements, in respect of the king's reversion, gained by conclusion.

THE like may be said likewise of all writs of *rege inconsulto* certifying of the king's seizures; which are peremptory, though they should not be tried; and the king may recite what he will, for it cannot be counterpleaded.

As for that point which mr. Solicitor did admit, I shall differ from him; I think he went too far. Saith mr. Solicitor, The judges may *ex scrutinio prætoris* take notice of the right of an office in their own court, and of the law thereupon; so that if any thing contrary to that be recited in the king's writ, they are not to be bound thereby; but I say the law is otherwise, for it is but reputation of right, and not certainty of right, that the court may concede upon usage and their private knowledge; for the court knoweth not what records or other proof may be shewed on the king's part. I pray let the king have that measure against the subject, that the subject hath against the king; and you shall find the subject's right shall not be prejudiced upon a private notice of the court, that it is not judicial. And for that case 25. E. 3. Fitzh. *Aid de Roy*, where in a *præcipe* the defendant made default, and it was alledged, nay it appeareth upon evidence, saith the book, that the reversion was in the king; and, saith the book further, the court would take no heed of it, but saith, it behoveth to bring a writ in the nature of a *receit*, and then we must give credit to it: and yet if this

conceit please any man, it is not our case; for this might have been alledged if the assise had been brought in the common pleas, for Brownlow is an officer there and not here.

AND lastly, if there should be some incongruity in the writ, as I know it was formed of as good counsel (not speaking of myself, but of the rest) as is in England, or hath been; but if, I say, mr. Brownlow will read us a lecture, he is never the nearer, for we can have a new writ if we will. It is not like *double aid*, if there should be fault in this writ; but sure I am that the matter is infallible; that whether this office and see be lawfully created, and confirmed by the king by his letters patents to Michell, or whether it be in disturbance of the freehold of mr. Brownlow, this must be discussed *penes ipsum regem*; and if I were to advise again, I would not alter one word of this writ.

Now, as for the command of this writ, by myself long since, when I first opened this case in this court, truly distributed into four kinds:

- A MINATORY commandment;
- A CONDITIONAL commandment;
- A PEREMPTORY commandment, TEMPORARY;
- AND a PEREMPTORY commandment, ABSOLUTE and PERMANENT.

THE first kind is the *circumspectè agatis*, where the writ purporteth an admonition to the court to be circumspect in their proceedings, that they do nothing in prejudice of the king, without any other commandment of stay.

THE second is, the *si voeis constare poterit*, where the writ doth lay it upon any special point, the truth thereof to be examined being left to the court, so as the commandment is conditional.

THE third is, where the writ is peremptory, but yet is for a time, and is *donec aliud habueritis in mandatis*,

OR

or *nobis inconsultis non procedatis*, which implies as much; and of this kind is our writ.

AND the fourth is *superfedcas omnino*, with an *allez à Dieu* to the plaintiff, which final writ is never but after the discussing of the plea in the chancery.

FOR the court's obedience, which is the relative to the mandate of the King, I said in the beginning, that the judges have ever been the principal examples of obedience to the king; and I will note unto the court four points, which I find in their predecessors concerning this writ.

FIRST, their wisdom and circumspection; for I may truly observe, that when this writ was brought, they have ever done less than their warrant.

So you see in the case 21. E. 3. where the writ was but a *circumspēte agatis*, yet when the plaintiff's counsel urged they might at least take the verdict, yet the court stayed presently.

So likewise in divers cases, where the writ was conditional, *si vobis constare poterit*; yet the court had no mind to meddle in it after that writ brought, nor to examine that point, which seemed to be left to them at large.

• So as still their obedience was more absolute than the commandment; and the court hath ever esteemed this writ as a thing sacred: for as it was the right of the Romans, that where a man's wall joined to a temple, if the owner had occasion to pull down his house, he left some of his own wall, lest he should touch the sacred wall; so the court would never venture upon the utmost bound of this writ, lest they should touch upon violation of the king's command.

SECONDLY, I note the reference which the judges used in 2. R. 3. in Hunston's case, where, after the writ was brought by the king's attorney, the judges would not suffer any public argument, but assembled in a private manner, the door shut, and upon conference

agreed to obey the writ, for they thought it a thing of no good example to dispute the king's commandment; as if they were like the soldiers which Tacitus speaketh of, *erant in officio, sed tamen quasi mallent imperantis mandata interpretari quam exequi*.

THIRDLY, I note the great humility of the judges in the phrase of the court upon this writ, where still they say, their hands are closed; as if they were turned statues or images, and that they had no power or motion.

LASTLY, I may note the danger of your predecessors in 1<sup>o</sup> of the book of Assise, where, although this writ was not brought, yet because the court did not of themselves *ex officio* regard sufficiently the king's title, it was said, the justice was suspended from his office, and was in men's great danger.

To conclude, I will reduplicate that which I said in the beginning, that this writ did ever stay the suit when it came, except only in two cases.

THE one in a direct case of an act of parliament to the contrary, *quod non superseclant*, as in *Bedinfield's* case, 28. Eliz.

AND the other is where in respect of a mischief, the court did proceed only *de bene esse*, lest that a *procedendo* should after come, and come too late.

THE case was (*a*), that an action of deceit was brought, and before the summoners were examined, this writ came; whereupon, after *Danby* had said, that their hands were closed, *Proctor* very worthily untied the knot; saying, "The mischief is great in this case, for if the summoners should die before examination, the plaintiff hath lost his action and his land for ever, although a *procedendo* should come after;" and compared it to the case of the writ of error for infancy, where perhaps the infant was near his full age: if the writ should be brought of the *rege inconsulto*, and then the full age should run on before inspection, the writ of error was gone and lost, and the fine

good for ever. "This therefore will we do," saith he:  
 "examine the summoner *de bene esse*, but with protestation  
 "withal, that we expect a *procedendo* to come." This was  
 good justice, and yet true obedience; but in no other  
 case shall you ever find that the writ was disobeyed.

THEREFORE I will end with this to your lordship  
 and the rest, that *obedience is better than sacrifice*; it is  
 a voluntary thing, and it is many times a glory or fame;  
 but obedience is ever acceptable.

I KNOW the prothonotaries are servants of the court;  
 but I know the court will more remember whom *they*  
 serve, than who serves *them*; and therefore I pray, as  
 the king commands, that the proceedings in this assise  
 be stayed, and that the plaintiff be ordered to sue to the  
 king, if he will.

Brook, Patents, 12. 13. H. 4. 14. 11. H. 4. 86.



## No. VII.

## CASE on the VALIDITY of EQUITABLE RECOVERIES.

*THE following Opinions having fallen into the hands of the Editor, and it appearing that they were given by Gentlemen of the first Rank and Character in the Law, upon a subject of great consequence, namely, the Validity of Equitable Recoveries, it was thought that their Publication would be acceptable to the Profession.*

## C A S E.

**B**Y a settlement made previous to the marriage of the marques of Bath (then lord Weymouth) with lady Elizabeth Cavendish Bentinck, lord Bath conveyed certain estates to the earl Granville and lord Hyde, to the use of himself for life, remainder to the intent that lady Bath should receive a certain rent-charge for her life by way of jointure, remainder to trustees for a term of 300 years in trust to raise portions for younger children, remainder to the use of the first and other sons of the marriage in tail male, remainders over.

LORD BATH'S estates being subject to several incumbrances, there were three schedules annexed to the deed of settlement; the first of which contained a list of all the mortgages which affected the estates that were settled on lady Bath and the issue of the marriage; the second contained a list of all the mortgages to which lord Bath's other estates were subject; and the third contained a list of all the annuities which affected lord Bath's estates,

IN order to indemnify the estates which were settled on lady Bath and the issue of the marriage from the incumbrances affecting them, lord Bath by the same deed conveyed other estates of great value, in Staffordshire and other places, to the earl of Kinnoul and the bishop of St. Asaph, and their heirs, to the use of them and their heirs, upon the following trusts, viz. upon trust to stand seised thereof as a collateral security to protect lady Bath and her issue in the quiet enjoyment of their respective provisions and estates; and in order that all the mortgage debts might be speedily discharged, it was declared, that the earl of Kinnoul and the bishop of St. Asaph should, by mortgage or sale of all or a sufficient part of the estates thus conveyed to them, raise such sums of money as should be necessary, first, to pay off the mortgages mentioned in the first schedule which affected the estates to be sold; secondly, to pay off the incumbrances mentioned in the second schedule, which comprised all the debts that affected the estates settled on lady Bath and her issue; and, lastly, to pay off the remaining mortgages mentioned in the first schedule; and upon further trust, that until such sale or mortgage should be made, the earl of Kinnoul and the bishop of St. Asaph should, by and out of the rents and profits of the estates thus limited to them, pay the interest of the incumbrances mentioned in the first and second schedules, and the annuities mentioned in the third schedule. And it was agreed, that after all the incumbrances mentioned in the first and second schedules should be paid, and after all the other trusts declared of the estates conveyed to the earl of Kinnoul and the bishop of St. Asaph should be performed, the earl of Kinnoul and the bishop of St. Asaph should stand seised of so much of the said estates as should remain unsold or undisposed of, and of the equity of redemption of so much as should have been mortgaged upon trust, to settle and convey the same (subject to the annuities mentioned in the third schedule) to such uses

intents, and purposes, as were declared concerning the estates limited to lord Granville and lord Hyde, that is, to lord Bath for life, remainder to his first and other sons in tail male.

NEITHER lord Kinnoul nor the bishop of St. Asaph ever sold or mortgaged any of the estates thus conveyed to them, nor were any of the mortgages contained in the two first schedules paid until the year 1787, when lord Bath and his eldest son, lord Weymouth (who had then attained his full age), joined in suffering a common recovery of the estates conveyed to lord Kinnoul and the bishop of St. Asaph: and the validity of this recovery having been objected to by mr. HOLLIDAY, the following opinions were given on the subject :

No. (1.)

IN the discussion of the marques of Bath's title to his estates in Staffordshire, in behalf of a mortgagee for 50,000l. I have been led to consider the nature of the trust reposed in the late earl of Kinnoul and bishop of St. Asaph, respecting the indemnity lands, of which the Staffordshire estate constitutes a material part.

THE complete legal interest in fee was unquestionably vested in those trustees, who were directed to stand seised thereof, at different periods of time, for very different and useful purposes: First, *in the mean time and until* the debts in the second schedule, amounting to 127,500l. were actually paid, as and for a collateral security to protect the marchioness of Bath and her issue in the quiet enjoyment of the settled estates: and in order that those debts might be speedily discharged, powers were given to the trustees to raise the 127,500l. by sale or mortgage of the trust-estates. And it is declared and agreed between the parties, *that after such time* as all the debts should be entirely paid off, and the several other trusts respecting the trust-estates should be fully performed, a new seisin should arise respecting such of the trust-estates as should then remain.

unfold,

unfold, and the equity of redemption of such part thereof as should have been mortgaged. The earl of Kinnoul and his co-trustee were then to stand seised of both classes of estates, upon trust that they and the survivor, and his heirs, should make an *effectual settlement* thereof respectively to the use of such person, &c. as by reference to the uses of the settled estates will vest an estate of freehold in the marques for his life in strict settlement, with a remainder to lord Weymouth in tail male.

THIS brief statement of the settlement in 1759, leads to the state of the trust in the deed of 21st March 1789, and the recovery suffered of the Staffordshire estate, without the concurrence of the trustees, and *previous to the payment of any part of the scheduled debts* amounting to 127,500l. The question now is, Whether this recovery, so suffered, has unquestionably barred the estate-tail and remainders, which were not to have existence until such time as the debts were entirely paid? I am truly sorry to find myself under the necessity of differing in opinion with an eminent conveyancer on this question, and beg leave to refer mr. Macnamara to the clear answer, by lord chancellor Hardwicke, in the great cause of Bagshaw and Spencer, which is too well known to stand in need of any state of the case. — *Per Curiam*. — “The clear answer is against the recovery; because the recovery by Benjamin Bagshaw was before the debts were paid; and consequently while the fee remained in the trustees, and he could not make a good tenant to the *præcipe*.” — Now, if such was the construction of a devise under a will, shall it be seriously said, that a limitation of an use to the trustees and their heirs by a deed, upon particular trusts, and for the most salutary purposes, until such time as the debt of 127,500l. was actually paid, shall not affect a recovery suffered before a single 1000l. of the debt was paid, and while the fee remained in the trustees? I think too highly of the candour and abilities of the gentleman who has given his approbation of the noble  
marques's

marques's title, to suppose that he will insist that the former recovery was unquestionably good. Two recoveries have been already suffered, and a fine levied; yet unless the Staffordshire estate is exonerated, not only from the portions of 60,000*l.* to the marques of Bath's younger children, but also from the subsisting annuities; and unless, after payment of the debts amounting to 127,500*l.* another recovery is suffered, I incline to be of opinion, that a clear and safe title cannot be made to messrs. Peels and Wilkes the purchasers. A further difficulty arises, with respect to the powers of sale being exercised previously to there being three years interest of the 270,000*l.* in arrear, under the following clause: "And for the purpose of better securing the sum of 270,000*l.* in case default shall be made in the payment of the same sums, or any of them, or the interest thereof, for the space of three years next after the 21st day of September 1789, contrary to the meaning of another indenture of release and appointment, then that the trustees should at any time within the said space of three years, with the consent of the marques of Bath and lord viscount Weymouth, sell the Staffordshire estate."—This incongruity has, by some strange accident, like a reptile, crept into the deed; and I am obliged to add, that the consent of all the mortgagees to a sale prior to an arrear of three years interest, appears to be necessary to perfect the sale of the Staffordshire estate. One further observation is necessary in behalf of the lender of 50,000*l.* which is, that this security should be derived from the estate of the vendors, in consideration of his advancing 50,000*l.* part of the purchase money, since great danger and inconvenience have arisen from vesting the inheritance in purchasers for a single day, to enable them to make an immediate mortgage thereof for a considerable part of the purchase money.

J. HOLLIDAY.

THE

THE preceding case and opinion were laid before sir JOHN No. (2.)  
SCOTT and mr. MADOCKS, with the following quære :

“ ARE you of opinion, that another recovery of the  
“ Staffordshire estate is necessary to be suffered before  
“ a clear and safe title can be made to said messrs. Peete  
“ and Wilkes, for the reasons contained in mr.  
“ Holliday’s opinion, or not ?

WE apprehend, that another recovery is not necessary.  
• We do not conceive that the case of Bagshaw and Spencer furnishes a solid objection to this. In that case the principal question was, Whether Bagshaw was tenant for life or in tail ? It was agreed that if he was but an equitable tenant, he was only tenant for life. But we apprehend that lord Hardwicke, when he decided that he was tenant for life in equity, meant to admit that he was, before the debts were paid, tenant seised of the present equitable freehold ; and we do not find, in that case, any principle to authorise its being considered as lord Hardwicke’s opinion, that he could not have suffered a valid recovery in equity, with a son of 21 years of age, before the debts were paid, because the legal fee was in the trustees. On the other hand, we apprehend lord Hardwicke’s reasoning to be to this effect : It being contended, that he had not an equitable but legal estate ; and that, for that reason, the limitation to the heirs of his body should be held to vest in him ; lord Hardwicke then objected to the recovery, because in that case his legal estate was an executory devise ; and he intimated, that it was an executory devise too remote ; but whether too remote or not, it was not a present legal estate, either of freehold or inheritance, and therefore his recovery would be bad. He held him to be tenant of a present equitable estate ; in which case, he said, his recovery could not be good ; because, if his estate was equitable, he did not think the words *heirs of his body* would enlarge it. And the case, therefore, proves no more than this : That a person claiming under

under an executory devise of a legal estate, when all debts are paid, and when the legal fee is in trustees for that purpose, cannot suffer a recovery before the executory devise, if it is good, takes effect in possession. But the case does not prove, nor do we apprehend the court meant, that where a person claims a present equitable estate to himself and the heirs of his body, or to himself for life, and to his first son and the heirs of his body, but which is subject to a legal devise of the fee to trustees for the payment of debts, such person cannot in the one case by himself, and in the other by joining with his son, acquire the equitable fee, subject to the legal fee. Bagshaw could not do so, because he was bare tenant for life in equity. We conceive that the cases in 1. Vern. 13. and in 2. Chan. Ca. 78. (recognized in Legate and Sewel, in P. Wms.), and the principles that result from them and other cases, authorize us in thinking another recovery not necessary, unless it can be maintained, that the marques of Bath was not tenant for life, even in equity; and lord Weymouth was not tenant in tail, even in equity, subject to the debts; and could not be said to have even equitable estates, before the legal estates were to arise. The doubts, however, of *mr.* Holliday are too respectable, if he retains them, to make it reasonable to expect, that a purchaser, when the purchase money is so considerable, should not have them satisfied in the manner he shall finally advise.

*Lin. Inn, 31 March, 1790.*

JOHN SCOTT.  
JOHN MADOCKS.

No. (3.)

THE case was then referred to *messrs.* SIDEBOTTOM and HOLLIDAY, who gave the following opinion:

See the Duke of  
Norfolk's case\*.

A SPRINGING use, or a springing executory trust, which must have the same construction, is analogous to an executory devise. Each took its rise from an inclination in the courts of law and equity to answer the exigencies of

\* It is intended to collect the several Arguments in this very important Case in a future part of this publication.

men,

men,\* and to give them a power nearly of the same nature as that which the law disallowed,—of limiting *a fee upon a fee*. Each is attended with the same consequence, that a fine or recovery will not affect it. In support of this doctrine, we beg leave to transcribe a part of the argument of lord Mansfield in the case of Goodtitle against Burtenshaw :

“ UNDOUBTEDLY a springing use is, under a deed, what  
 “ a devise, upon which no estate can vest at the time  
 “ of the testator’s death, by reason of his having  
 “ primarily disposed of the whole fee, is under a will.  
 “ Now, upon an executory devise, nothing can vest,  
 “ till the fee-simple ceases to exist; because, as that  
 “ may continue for ever, it does, during its existence  
 “ absorb the whole quantity of estate. And so, in  
 “ favour of intent, the law supports the possibility in  
 “ the second devise by construing it a devise  
 “ executory.”

SEE also the case of Lloyd and Carew, Prec.\* in Chancery, 72, and Shower’s Cases in Parliament, 137, which clearly prove, that a shifting use under a deed cannot be barred by fine or recovery till it takes effect in possession. In the case of Bagshaw and Spencer, lord Hardwicke, after observing that the limitation was too remote to be considered as an executory devise, being after all the debts indefinitely should be paid, which might in point of time exceed the compass of a life or lives in being, lays it down as a preliminary point,

“ THAT the recovery suffered was before the debts were  
 “ paid, and consequently Bagshaw could not make a  
 “ good tenant to the *præcipe*, to support the recovery,  
 “ and to bar the contingent remainders.”

THESE,



THESE, we have reason to believe, were the *very words* of his lordship, taken from *his own* hand-writing, and copied into a book now in the possession of Mr. Sidebottom.

If it were necessary to comment upon the words of this decision, we should say, the recovery, being suffered before the event happened which was to give birth to the future executory trusts, could not operate to destroy them; because Bagshaw, whose only claim was under those executory trusts, had not a transferable interest in him.

FROM these great authorities we think ourselves warranted in maintaining, that whether the limitations in the present case be considered as springing or shifting uses at law, or springing executory trusts (and if they are none of these, we know not in what class of limitations to place them), they are not barred by the recoveries already suffered; because at the time of suffering those recoveries the event on which they were to take effect (namely, the discharge of the debts) had not happened. We therefore contend, that the learned counsel who have argued with great ability against the necessity of another recovery, by admitting that a person claiming under an executory devise of a legal estate, when all debts are paid, and when the legal fee is in the trustees for that purpose, cannot suffer a recovery before the executory devise, if it be good, takes effect in possession, drew the inference for us, unless they deny the analogy (which in this respect we think too well established) between an executory devise and a 'springing use or trust.

RADCLYFFE SIDEBOTTOM.  
JOHN HOLLIDAY.

No. (4.)

THE opinion, No. 3, having been referred to Mr. MANOCKS, he gave the following opinion:

I DO not find, by the paper which was intended to be an answer to the opinion on the *marques of Bath's* case, that

that these propositions are doubted, upon which the question depends, viz.

1<sup>st</sup>, THAT if the legal estate of land is by a deed placed in a trustee, and the beneficial interest or equitable estate is in *A.* for life, remainder to *B.* in tail; in such case the equitable tenant for life, and remainder-man, can suffer a good recovery to bar the estate tail and remainders, without the concurrence of the trustee, in making a tenant to the *præcipe*; and that when the recovery is perfected, the trustee will stand seized in trust for such uses as are declared of the recovery; and that such recovery is styled "an equitable recovery," or "a recovery of the equitable estate."

2<sup>d</sup>, THAT if the legal estate of land is, either by deed or will, placed in a trustee, upon trust, by mortgage or sale to raise money for the payment of the debts of the party generally, or the debts mentioned in a schedule, and from and after payment thereof to convey the estates remaining unfold, and the equity of redemption of such as shall be mortgaged to *A.* for life, remainder to *B.* in tail; in such case, if the trustee enter, and receive the rents, and *A.* the tenant for life brings his bill for an account of the rents; a court of equity, in ordinary experience, decrees an account to be taken of the debts, and of the interest due upon them, distinguishing between the interest due at the testator's death (if it arises upon a will), and the interest incurred since his death; and (if it arises upon a deed with scheduled debts) an account to be taken of the interest of the debts accrued since the date of the deed; an account to be taken of the rents received by the trustee, and that out of the rents the interest incurred shall be paid; and that the residue of the rents shall be paid to the tenant for life; as a tenant for life is bound to keep down the interest of incumbrances upon the lands.

3<sup>d</sup>, THAT in the above case, if the trustee does not act, but the tenant for life enters upon the lands, and receives the rents, if a bill be brought by the remainder-man, or by the

the creditors against the tenant for life, the court decrees an account of the interest in the manner above-mentioned, and of the rents; and directs the interest to be paid out of the balance of rents; and the surplus rents, after keeping down the interest, to be retained by the tenant for life, unless it appears that the estate is insufficient to answer the incumbrances. The trustee does not commit a breach of trust, though he has acted in part, and lets the tenant for life into possession, if the estate is sufficient in value.

4th, If a bill be brought for the execution of the trusts of the deed or will, and the court directs the debts to be raised by mortgage, the tenant for life will be directed to keep down the interest of the mortgage, and to have the possession of the estate and a conveyance.

THE consequence is, that from the day of the execution of the deed (if the trust be created by deed), and from the day of the death of the testator (if the trust is created by a will), the person who is to take the first estate of freehold, under the conveyance directed to be made, takes the beneficial or equitable interest in the lands, subject to the exercise of the power given to the trustee, of raising the debts by sale or mortgage; and if the first taker is tenant for life, he is bound to keep down the interest of the incumbrances out of the rents, and to have the residue of the rents for his own benefit: if the lands are of sufficient value to answer the amount of the incumbrances, he is intitled to such surplus rents from the date of the deed, where the trust is created by deed; and from the testator's death, where it is created by will.

THIS right does not depend upon particular decisions that can be named, but upon the constant uniform course and practice of the court, founded in reason and natural justice, and is as old as the court itself.

THE marques's case is a conveyance of the unsettled estates to trustees upon trust, to raise money to discharge the incumbrances upon the settled estates, and in the mean  
time

time to indemnify them from the incumbrances, and subject to such trust; and after the purposes of the deed are satisfied, to convey to the uses of the settled estates, viz. to the marques for life, remainder to lord Weymouth in tail.—Agreeably to the course of the court of chancery, the trustees, lord Kinnoul and the bishop of St. Asaph, permitted the marques to continue the possession and receipt of the rents of the unsettled estates, for the purposes of keeping down the interest of the incumbrances on the settled estates, and of retaining the surplus rents to his own use. Now, unless by the course of the court of chancery (within whose sole jurisdiction all trusts are) the marques had an estate for life vested in him in possession in equity; if he was not intitled to the beneficial interest in possession, but all right to the possession in him was suspended until the trust should be fully performed, and the conveyance made, lord Kinnoul and the bishop of St. Asaph were guilty of a breach of trust, in permitting a person who had no present right or interest in the estates to continue in possession, and receive the rents of the estates to this time. If the marques had not a present right under the trust, he has received the rents from the time of his marriage wrongfully: and if he received them wrongfully he ought to account for them, to be applied in exoneration of the settled estates. I pursue the notion of the marques not having an estate for life in possession (which is the proposition the other gentlemen wish to maintain) thus far, to shew the absurdities that follow from it: but there is another still more important. They contend, that nothing vested in possession of the marques till the settled estate was disincumbered; that the limitation to the marques for life is either a springing or shifting use, or a springing executory trust, or a future executory trust; that such interests are of the same nature with executory devises; and an executory devise, after all debts indefinitely should be paid, is too remote and void.

IF this be true, then the limitation to the marques for life, the reversion for his younger children, the limitations to his sons, and all the remainders, are void *ab initio*: and (subject to disincumbering the settled estates) the marques has all the unsettled estates back again; and he had the occupation at the time he suffered the recovery to commence after the debts should be paid: but in the mean time this equitable fee simple was in abeyance, and did not belong to any body, but was in *nubibus*. It will be very extraordinary if the ablest lawyers in the kingdom should approve of such a settlement as that of 1759, if the effect of it was such as is insisted upon.

THE truth is, that all the estates, both legal and equitable, vested in the several parties intended to be benefited by the deed, upon the execution of the deed, *viz.* in those who had legal estates, according to the rules established in courts of law; and in those who had equitable estates, according to the rules in courts of equity; and the marques having an equitable estate vested in him in possession, according to the rules of courts of equity; therefore the marques, having an immediate estate of freehold in possession, made a good tenant to the *præcipe* in the recoveries suffered.

*Lin. Inn, 21st April 1790.*

JOHN MADOCKS.

No. (5.)

THE opinion No. 3. having been also referred to by JOHN SCOTT, he gave the following opinion:

MANY of the principles *here stated* are incontrovertible. The inference which has been drawn from those principles by different gentlemen considering the case, have been however, very different: and it may be right to observe that those who have differed from this opinion have not denied the analogy between executory devises and executory trusts, and yet have by no means drawn the inference with which it is supposed they have furnished the gentlemen who have written the above opinion. The reasoning from *Bagshaw* and *Spencer*, upon the very words of

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lord Hardwicke, appears to me to be incorrect; and nothing can, in my judgement, more clearly follow from lord Hardwicke's reasoning, and from the reasoning in the above opinion, than this :—That if this doctrine of analogy was supposed by lord Hardwicke to apply in the way now contended for, all the reasoning in Bagshaw and Spencer was thrown away; for if the estate in Benjamin, being a legal estate, was too remote as an executory devise, it must have been too remote also as an executory devise of an equitable estate; and it could answer no useful purpose to enquire, Whether his estate was an estate for life, or an estate in tail? But lord Hardwicke clearly thought he had a good life estate in equity, which he could not possibly have, unless that was a present and not a future executory estate; for if it was a future executory estate in equity, the objection from remoteness was just as available against the equitable limitation as it would have been against a future executory legal estate. With much deference, I doubt whether it is not confounding ideas, to term Bagshaw's estate, or the estate now in question, a springing trust. I cannot but think that, if the reasoning in Bagshaw and Spencer is to apply at all, as it must have applied in that case, on the ground of remoteness to prevent Bagshaw's taking any future estate, even in equity; so in this case (unless a material difference arises from the circumstance that the debts to be paid are not indefinite), it must destroy the whole of the limitations subsequent to that, to the trustees; and the interest remaining undisposed must result to those who had it before the conveyance was made. After the debts are paid, there will be a springing trust to convey the legal estate to the parties, who appear to me, at this moment, to have an equitable estate, though it does not authorise them to call upon the trustees as yet to convey; that is, a present equitable estate in so much of the property as is not necessary for the execution of the trusts, for discharging which the legal fee has been given. And I think it will be found exceedingly difficult to say in whom

the equitable beneficial interest of so much of the property as is not necessary to be so applied, at this moment resides, if it does not reside in the persons who will hereafter have a right to clothe it with the legal estate. If this sort of conveyance is not to be construed to vest the present equitable fee in the several persons who may hereafter be intitled to call for the conveyance of the legal estate, which is created to enable the trustees to pay the debts, subject to the purposes for which that estate is created, must not the gentlemen who consider this as a springing trust, and not as an immediate trust, subject to those purposes, further consider, Whether, if it be a springing trust, a recovery, even at the time they mention, will do, unless it will be good by reason of the estate which the authors of this conveyance had before it was made? In Bagshaw's case, if lord Hardwicke was right in thinking the limitation, if of the legal estate, too remote; could he have held that, after the debts were paid, Bagshaw and his son could have suffered a good recovery of an estate in its origin too remote? If he could not, and there is a strict analogy between future legal and future equitable estates, must not such a limitation of a future equitable estate be open to precisely the same objection? If it is not, this consequence follows:—That if you give such a future legal estate it is bad, because you shall not tie up property so long; but you may, by giving a future equitable estate, tie it up to a period too remote to be allowed in the limitation of a legal estate. Upon this ground it seemed, and it still seems to me, that lord Hardwicke really proceeded in the case of Bagshaw and Spencer. He admitted, that if the limitations to Bagshaw and the heirs of his body were legal estates, Bagshaw would be tenant in tail, if the limitation was not too remote; but he thought the limitation *was* too remote, and therefore he would not construe it to be the intention of the author of the gift to give a legal estate, when he must defeat the intention entirely by such a construction. He construed it,

it, therefore, an equitable estate: but if, by construing it an equitable estate, he had meant, that in such construction it was to be taken as a future springing trust, he had done nothing to save the intention of the author of the gift; for the same objection of remoteness would apply; and that which, if a legal executory devise, upon that ground would have been bad, could not be good, because it was a springing trust. But I apprehend lord Hardwicke did not consider it as a springing trust, but as an immediate trust estate; not entitling, however, the parties to call for a conveyance of the legal fee till a future period; and I do not take his words to apply to an equitable recovery, if it had been suffered by Benjamin (who he held could be tenant in tail, because his estate was an equitable estate), and a son who had attained twenty-one. And I misapprehend the case, if lord Hardwicke would not have held, that such a recovery would have been a good recovery in equity, before the debts were paid, because the father and son would have had respectively a present and not a springing equitable estate in so much of the premises as the trustees should not sell; though he reasoned, and undeniably, that if Benjamin was to be considered as a devisee of the legal estate, it was a devise to him of a springing future estate, where his beneficial interest could not be present, because it was to commence with his legal interest; and where therefore, in his opinion at least, not merely because he could not make a tenant to the *præcipe*, his recovery would be void, but because his estate, both in law and equity, would have been too remote: and unless lord Hardwicke did think that the father had a present equitable estate, and not a springing trust, merely because he could not call for a conveyance of the legal estate till a future period, he could not, upon his own principles, have held Benjamin tenant for life in equity, but he must have held (upon his own principles I mean) that he took no estate at all, because he took under an equitable limitation too remote. Upon these



## CASE ON THE VALIDITY OF EQUITABLE RECOVERIES.

grounds it appeared to me, that in lord Hardwicke's opinion Benjamin and his son, being 21, could have suffered a good equitable recovery, before the debts were paid, which would have vested in them the equitable fee of so much of the property as should not be sold by the trustees: and, admitting the analogy between future executory devises of the legal estate and springing trusts, it appeared to me, that courts of equity had not construed conveyances of this sort to be intended to create *future springing trusts*, because then such limitations must be affected by the same objection of remoteness as applies to future executory devises, which are too remote; but has construed them to create present equitable estates, with a future right of calling for the legal estate; permitting a recovery to operate upon that present equitable estate, and holding it to give the party, who, if he did not suffer a recovery, could only call, at that future time, for a conveyance of the legal interest, according to the quantity of the estate which he took under the instrument that created the trust, a right at that future time to call for the legal fee in so much of the estate as the trustees should not have sold. It was not, therefore, my intention to deny the analogy which has been mentioned; but to submit, whether this is not an immediate equitable estate, instead of a springing trust; and to ask, if it is not, how the springing trust in *Bagshaw and Spencer* (admitting the analogy) could be good, when it was as remote as the executory devise, which lord Hardwicke held would have been too remote.

I HAVE thrown together these observations hastily, but with a view that I should at least be understood. I have before said, that I cannot but admit that a purchaser cannot be reasonably expected to give up objections stated by such persons as those whose names appear to this opinion; but I have much anxiety that this point should be farther considered, because I cannot too much suspect my own opinion upon such a point, so strongly discountenanced as it appears

to be by the language of that upon which I have been observing, and the importance of the point to the interest of the family, as to the estates not included in this purchase, makes it impossible for me not to say explicitly, that the title to the other parts of the estate must not be suffered, without further consideration, to rest upon any opinion of mine.

*Lin. Inn, April 15, 1790.*

J. SCOTT.

ALL the preceding opinions were lastly laid before mr. N LARNE, with this *qualie*.

“WHAT is your opinion upon this point? Are the recoveries suffered of the trust estates in 1787 bad, for the reasons in messrs. SIDEBOTTOM’S AND HOLLIDAY’S opinions, or not?”

To which he gave the following answer:

COULD I have entertained a *doubt* on the point upon which my sentiments are now required, after admitting the principles and authorities noticed in the opinions of the gentlemen who have thought the recovery of the trust estates insufficient for the purposes intended by it, *that doubt* would have been removed by the reasoning of the gentlemen who have differed from those opinions. But, abstracted from any other influence whatever, I could not have hesitated upon the *principles and authority laid down and resorted to* in the premises, but in effect denied in the conclusion of the first-mentioned opinions, to consider the recovery already suffered by the marques of Bath and his son, of the trust estates in question, as valid and effectual for the purpose intended, as any future recovery, at any other period whatever, could possibly be. The *allowed analogy* between executory devises and future or executory uses or trusts, I apprehend, denies our

admitting *validity* to a limitation of the latter description, that would be too *remote* under the shape of the former; and leads to the *conclusion*, that if a limitation after payment of debts, not limited in point of time, would not be good as an *executory devise*, it would be *equally, void* as a future executory use or trust. Lord Hardwicke's opinion in Bagshaw and Spencer, the case referred to and relied on in messrs. Holfiday's and Sidelbottom's opinions, tells us, in answer to what his lordship observes was argued, of its being good as an *executory devise*, that it was *too remote*, being after all debts indefinitely be paid; which might in point of time exceed a life or lives in being, or any other time allowed by law. The direct inference from the above-mentioned conclusion, connected with this opinion of Lord Hardwicke in the case referred to, I conceive, is, that an executory use or trust, after payment of debts unlimited in point of time, would be void as too remote. From these premises, therefore, I should have concluded, that the trust limited in the present case for a settlement *after payment of the debts*, directed to be raised by sale of, the lands now in question, a payment unlimited as to time, and which might not be made within any period allowed by law for the executory devises, would have been void as an executory use or trust (except, perhaps, as to the marques's estate for life, and his lady's jointure, which were confined to lives in being); and consequently, that such trust, never coming into existence or effect, could be no more the subject of any valid or operative recovery at any future period, than at the time of the recoveries already suffered. But that the *trust*, being *void* after payment of debts, must have resulted to the marques of Bath, as *not* disposed of by him; and that the conveyance and recoveries by him, of course, made an *equitable title* after and subject to the trust for payment of debts, which left no room for the aid of any future recovery; this, I say, would have been my *conclusion* upon the case, from the

*analogy*

analogy between executory devises and executory uses or trusts, and lord Hardwicke's opinion in *Bagshaw* and *Spencer*, considering the trust in question as *future and executory*, after payment of the debts directed to be raised by the trustees. But a farther attention to the reasoning and decision in the case of *Bagshaw* and *Spencer*, will by no means indeed suffer me to consider such trust as an executory or *future trust*, giving *no interest* at all to the objects of it *before the debts were actually paid*; for the devise to *Bagshaw* in that case was held to be an interest *actually vested in him*, subject to the trust for payment of the debts: both the Master of the Rolls and lord Hardwicke agreed in that point. For the first considered it, though clearly a trust and not a legal interest in *Bagshaw*, yet as falling within the rule in *Shelley's* case, to give him an estate tail, executed; whilst lord Hardwicke, upon the distinction between a trust and a legal estate, denied the operation of that rule, and held that *Bagshaw* took only *an estate for life*. To shew that lord Hardwicke agreed with the Master of the Rolls, that *Bagshaw's* estate was vested, and such as would have given effect to his recovery if it had been an *estate tail*, we have to observe, that he divided the case into two general questions:—First, Whether the estate devised to *Bagshaw* was a trust or legal estate? Secondly, supposing it a trust, Whether it was an estate tail to *him*, or an estate for life only? Upon the *first*, he declared his opinion, that it was merely a trust in equity; and upon what had been argued in support of a *legal estate*, that it might be good by way of *executory devise*, his lordship asked, “But could *Bagshaw* thereby take a legal estate?” To which he answered, he could not, or did not if he might; and his devisee could not claim it from him. In affirmance that he could not, lord Hardwicke said, it was *too remote*, being after all debts paid. And to shew he did not if he might, that is, even supposing it not too remote as an executory devise,

devise, he says, "but a clear answer is, *Because the recovery by him was before the debts paid, and consequently whilst the fee was in the trustees, and he could not make a good tenant to the præcipe.*" Now what was this a clear answer to? Most evidently to any claim of Bagshaw's devisee, founded on the *supposition* of the estate devised to Bagshaw being a *legal estate by way of executory devise*. Under such a supposition, lord Hardwicke said, Bagshaw's devisee could not claim the estate from him, for it was *too remote*; but that a clear answer, whether too remote or not, was, *Because the recovery was suffered by him before the debts paid; and consequently before his estate, considered as a legal one by way of executory devise, could be vested in him.* "And *then,*" proceeds lord Hardwicke, "*supposing it a good devise in law to Bagshaw, THIS would prevent its passing by his will; that is, supposing it a good executory devise of the legal estate, the recovery being suffered before it vested, would prevent its passing by Bagshaw's will;*" which made it *necessary*, his lordship said, for the plaintiffs to admit (what his lordship had just before declared to be his opinion), that all the subsequent devises were *trusts in equity*. But where in the name of wonder could be the *necessity* for, where the *avail* of such an *admission*, if *these trusts* were also to be held executory and future, not vesting till after payment of debts? Certainly none; for the same clear answer would have existed to the plaintiff's demand *under that admission*, as under the supposition of an executory devise, *viz.* that the recovery was suffered before the debts paid. *This trust* therefore, which lord Hardwicke held Bagshaw to have taken by the devise to him, and which he said the plaintiff was under the *necessity of admitting*, to avoid the objection from the *recovery having been suffered before the debts were paid*, must of necessity have been a *vested trust*; to which lord Hardwicke did not direct or consider the *said clear answer*

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of the recovery being suffered before the debts were paid, *at all applicable*; and such a one as reduced the merits of the case to what lord Hardwicke termed the second and main question; and of which he then proceeded to a very elaborate discussion, viz. Whether Bagshaw's estate was an *equitable estate tail*, or *for life only*? It is most evident, that no *occasion* nor *room* could then have existed for any attention at all to *this question*, much less for the pains lord Hardwicke bestowed upon it, unless the estate devised to Bagshaw had been held *vested* as an equitable interest, subject to the payment of the debts; for if not *vested*, his recovery could not have operated upon it, though it had been an estate tail; and as he was dead without issue before the debts paid, it never could take effect at all, any more than if the devise to him had never existed: the point, therefore, what *estate* Bagshaw took under the devise in question, could not in any degree have influenced the right of the parties at the time of the discussion, under any *other supposition* than that of its being a *vested interest*; and *such a one* as, if held, an estate tail would have enabled him, by means of his recovery, to have made that disposition of the estate under which the plaintiff claimed. If lord Hardwicke had not actually *affirmed* that such was his opinion, in the most direct and explicit terms, I should yet have thought the important manner of his treating the question, whether Bagshaw took an estate tail, or for life only, would not have admitted a *doubt of it*. But, considering the use that has been made of, and the inference drawn from, some expressions of his lordship's, without regard to the context or circumstances explanatory of their application, I cannot suppose his expressions will meet with *less attention*, when supported by necessary and obvious inference from context and circumstances decisive of their application. His lordship, after declaring his opinion that the devise to Bagshaw was a trust in equity; that

that the argument for an executory devise would not answer the plaintiff's purpose, as the clear answer to it was, that the recovery was suffered before the debts paid, and therefore it was necessary for the plaintiffs to admit that it was a trust in equity; proceeds to say, that the second or main question (whether it is an equitable estate tail, or for life only, with contingent remainders to the issue) depended on the construction of the words, "heirs of the body;" &c. as they stood in the will, whether as words of limitation, or purchase: for if of limitation, he was tenant in tail, and the RECOVERY WAS GOOD IN EQUITY: if of purchase, he was tenant for life only, and it (that is, the recovery) was void. Such were his lordship's words, according to the report of the case from which the quotation in messrs. Holliday's and Sidebottom's opinion appears to have been taken. Is it possible, after this, to resort to lord Hardwicke's doctrine in the case of Bagshaw and Spencer, as an authority that the limitation of an estate, after a trust for payment of debts, does not give an equitable vested interest, subject to the payment of debts; that an estate tail after such payment is not an interest *so legal*, so as to capacitate the *cestui que trust* of such estate to bar it by recovery; is it possible, I say, to conceive that lord Hardwicke held the suffering of the recovery by Bagshaw before the debts were paid, a clear answer to the claim of Bagshaw's devisee, when he declares the effect of that recovery depended on the construction of the words, "heirs of the body," in the devise to Bagshaw; for that if they were words of limitation, he was tenant in tail, and the recovery was good in equity? Can any such position be assumed as a serious inference from the case of Bagshaw and Spencer, to be maintained a moment in the understanding of any man who will be at the trouble of reading the report of that case; and lord Hardwicke's argument and opinion upon it. I have entered thus, perhaps, too tediously into the case

of Bagshaw and Spencer, to shew the fallacy that may attend an inadvertent recourse to particular *sentences or expressions detached* from their context and relation to the general argument or discussion in which they occur ; and I am mistaken indeed if, after reading the case referred to by the opinions of messrs. Holliday and Sidebottom, any professional gentlemen can discover what sort of countenance those opinions can derive from it. The apparent absurdity of the resort, from gentlemen of less *professional character and abilities*, would have excused the attention I have now paid it. But when gentlemen of such eminence and character in the profession will attempt to support a novel opinion by a quotation from high authority, *which* though when taken in a detached state appears to apply, yet when connected with a few preceding or subsequent lines, in the place from whence it is taken, is found to be quite foreign to the purpose ; I think it of some importance to the profession to have the *mistake* clearly pointed out, and those consequences prevented that might otherwise attend a too implicit reliance on the respect attached to such names.

THE solicitor general has expressed his doubt, Whether it is not confounding ideas, to turn Bagshaw's estate, or the estate now in question, a *springing trust* ? It certainly is confounding of *terms* (which induces a confusion of ideas) to call a *vested trust* (as that of Bagshaw was acknowledged and affirmed to be, and as that now in question must upon the *same principles*, I think, appear to be) by the name of a *springing trust*. And it may be proper to observe, that the expression *springing trust*, which occurs on this occasion, in company with that of *springing uses*, seems to be equally the subject of correction as applied in this case ; for the interest intended to take effect after payment of the debts, whether *vested* or *springing*, could in no sense come under the description of *springing uses* : they were not *uses* to arise under the original conveyance to the trustees, or to

which



which those trustees were to stand seised. No; the *use* was to continue in the trustees, until, and in order to, their *springing and conveying* the surplus estates to the *uses* directed, after payment of the debts. The *uses* of such new settlement and conveyance were not to *spring* from the *original conveyance*; they were no part of the *uses limited by it*, nor to be served by the *seisin acquired by the trustees under that conveyance*, but were to derive their existence as *uses* from the *new settlement or conveyance*, so to be made by those trustees in whom the *whole use and legal estate* was completely vested by the original conveyance. A springing use, therefore, seems entirely out of the question, unless an arbitrary or capricious use of words, arising from some *defectory or springing ideas*, can impart any shifting or *springing quality* to a *use*, where the conveyance from which it derives its existence gave it no such movement. I should not have noticed this exuberant freedom of style, but from a serious persuasion that a *confusion of terms*, in any science, tends to confound the science itself, by destroying that precision of ideas, that distinction among its objects, which is the very ground-work of all knowledge: "*Nomina si perdis, certe distinctio rerum perditur.*"

I observe, that the solicitor general has inserted in his opinion what strikes me as an oblique parenthetical glance of *ridicule* at any possible supposition of a material difference between the present case, and that of Bagshaw and Spencer, from the circumstance that the debts to be paid in the present case are not indefinite. And *ridiculous*, I conceive, would be the attempt of any argument on that ground, in support of the validity of the limitations, after payment of the debts, in this case, as a *future executory trust*, or against their *creating a present equitable interest*, as in Bagshaw and Spencer. We are to consider, that it is not the unascertained quantum of the charge that renders the limitation, after payment of debts, too remote as an executory or future interest, it is the indefiniteness of the *period or time of payment* (that is, of the *commencement of such future interest*) that

that prevents its validity. The specification of the debts to be paid advances not a step towards *limiting the period* of their being raised and paid: that remains equally unlimited and *indefinite*, whether the debts be ascertained or not; and may equally, in *point of time*, exceed a life or lives in being, or any other period allowed by law for executory estates; and, consequently, is equally liable to the objection of remoteness. If any difference exists between the present case and that of Bagshaw and Spencer, from the circumstance of the debts in the present case not being *indefinite*, which can in any degree influence the present question, I apprehend it must operate entirely *in favour of a vested instead of future interest* in the present case, and render it a *stronger case* in that respect than Bagshaw and Spencer. If a limitation after payment of debts indefinitely, and where the unlimited extent of the charge leaves it *undetermined* whether it may not exhaust the *whole trust fund*, and leave *nothing for the ulterior limitations to attach upon*; if such an *uncertain benefit*, I say, is held to be a *present vested interest*, where can be the room for doubt in a case where the *definite limits of the charge*, compared with the *fund*, discloses the *certainty of the present existence of a beneficial interest*, as the subject of the ulterior limitations?

As to the reference to the duke of Norfolk's case, and some observations of lord Mansfield to establish the allowed analogy between executory devises and springing or executory uses and trusts, it is *evident* they are in support of an opinion *founded on such analogy*, viz. that what would be *too remote* as an *executory devise*, is *equally so* as a springing use, or future executory trust; and, consequently, that the limitation in the present case, after payment of the debts unlimited in point of time, and which might exceed any period allowed for executory devises (so far, at least, as it is not confined to lives in being), cannot operate as a springing use, or future *executory trust*, and can be valid only by way of a *vested trust*, as in Bagshaw and Spencer.

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## CASE ON THE VALIDITY OF EQUITABLE RECOVERIES.

This conclusion excludes the application of the reference made by the *same gentlemen* to the case of *Lloyd v. Carew*, which, as it only concerns the insufficiency of a recovery to *bar the shifting or springing use*, seems irrelative to the *present case*, until the *previous question* respecting the existence of a use or trust of *that description here* he decided in the *affirmative*; which seems utterly impossible, without denying the principles *resorted to* by messrs. Holliday and Sidebottom, respecting the analogy between an executory devise and a springing use, and lord Hardwicke's opinion in *Bagshaw and Spencer*; and *from which indeed* it might have been expected *those gentleman* would have drawn the *necessary inference* themselves, instead of referring that task, as they have *most ingeniously* contrived to do, to the solicitor general and mr. Madocks; an inference too obvious to the latter gentlemen not to occupy the *very first words* of their joint opinion, "*that another recovery is not necessary.*"

I MIGHT here close my sentiments on the case, by joining, as I most clearly do, in the *same inference* from the *same principles*. But, I shall proceed through a few lines more, in order to notice a case or two in confirmation of the doctrine, in the case of *Bagshaw and Spencer*, in regard to the *vesting of an immediate interest* under a limitation, after payment of debts, in *Wallis v. Crimes*, 1. Cal. Canc. 89. Upon a conveyance by *A.* to trustees in trust, that if his son *B.* six months after his father's death, secured to the trustees 500l. for the benefit of *B.*'s younger children, then *after such security first given to the trustees, to convey the lands* to *B.* and his heirs, and *until the time limited for giving the security to stand seised to, the use of B.'s eldest son*, and in default of such security on his (the eldest son's) request *to convey to him*; *B.* being in possession mortgaged the lands; and though he died without giving such security, yet his mortgage was decreed *valid* against the defendant, his eldest son: though it was contended that, in *default of giving security* in six months after *B.*'s father's death, the trustees

trustees were to convey to the defendant, and the security was first to be given, before *B.* was to have any thing in the lands. Now this case was free from the objection of remoteness, even if considered as a future executory trust, vesting no interest in *B.* till after the security given, according to the express direction of the trust, and yet it was held to be in equity a vested transferable interest in *B.* subject to the payment of the 500*l.* even before any security given.

In the case of *North v. Champernown*, 1. Cas. Canc. 63. 78. (also reported 1. Vern. 13.) there was a trust after payment of debts for *A.* in tail, with remainders over; and it was held, that a recovery suffered by *A.* without the concurrence of the trustees, barred the remainders. It is not indeed noticed whether the debts were then paid, though it appears by the decree, as stated in *Can. Cas.* 78-9. that there were debts to be paid out of the money for which the estate was sold, by those claiming under the recovery: those, however, might have been the debts of their testator *A.* who suffered the recovery, as he devised the lands for payment of debts and legacies, according to *Vernon's* report of the case. From the silence, however, as to that point, we may infer, that the trust being after payment of debts, was not supposed to influence the question; and it is a direct authority among others, that where the trust is considered as vested in those cases, the concurrence of the trustee is not necessary to the effect of the recovery. And in the case of *Bakett v. Pierce* (1. Vern. 226.), where there was a devise in trust to pay debts and legacies, and afterwards to *A.* in tail, who levied a fine, and died before the debts and legacies were paid, the lord keeper was of opinion, that the remainder-man was barred by that fine and five years nonclaim, which supposed the equitable entail vested in *A.*; for otherwise his fine could not have barred, because "*partes finis nihil habuerunt.*"

HERE I may likewise notice, what is observed in the case reported 2. Ventr. 346. where the testator ordered that all his personal estate, *after his debts and legacies paid*, should be laid out in lands to be settled as there directed: the reporter observes, that though it be said the money was to be laid out *AFTER all legacies paid*, yet *all besides what serves to pay the legacies* should be laid out *presently*. Now this seems very analogous to the considering the *surplus interest* in lands subjected to debts, &c. *as vesting presently* in the persons to whom the lands are limited after payment of such debts, &c.

IN the case of *Bale v. Coleman*, 1. P. Wms. 145. and 2. Eq. Abr. 309. the devise upon which the case arose was *after payment* of debts, and the recovery there was suffered by the devisee *before the debts were paid*, according to the report of the case by Mr. Viner, and stated 2. Eq. Abr.; and yet Lord Hutcourt does not seem to have considered that as *any obstacle* to the recovery, as I collect from what is stated of his decreeing the said devisee's share to him *in tail*, remainders over, because *that was thought more proper*, by his own counsel, than *an objection in law*.

THE next case I shall mention appears not, I think, at all deficient either in strength of circumstances or in weight of authority. The case I mean is that of *Barnardiston v. Carter*, before the Lords in 1717, reported 2. Brown Cas. Parl. 1.; where the testator, after empowering his executors to receive the rents and profits thereof, for discharging his debts in aid of other funds, devised certain manors, *after such time as his debts and legacies should be paid* by the rents and profits thereof to his uncle Evers Armyne for life; and if he should have any issue male, then to such issue male and his heirs for ever; and in case he left no issue male, then, *after such time as his debts and legacies were fully paid*, he devised one of the manors to his nephew Style in fee, and the other to another nephew in fee; and the testator in his will declared, that his debts  
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were only those which were mentioned in a schedule, and no more. The testator afterwards mortgaged one of the manors for 4000*l.* and out of that money paid off all the *scheduled debts*; and afterwards by a codicil devised some new-purchased lands to his said nephews in fee, and died, leaving the said mortgage of 4000*l.* undischarged. Upon the hearing of the cause before the lords, three questions were made for the opinion of the judges:—*First*, Whether the will did extend to include *all the debts* of the testator? To which their opinion was delivered, That it did extend to include *all his debts*.—*Secondly*, Whether the estate for life was *vested in Evers Armyne* at the time of the recovery, *before all the debts were paid*, so that he could *make a tenant to the præcipe*? Upon which the unanimous opinion of the judges, after being allowed till the next day to consult upon it as a question of great importance, was, That the estate for life *was vested in Evers Armyne* at the time of the recovery. —*Thirdly*, Whether the remainder to Style *was of that nature to be barred by the recovery*? To which the opinion of the judges was, That the same was only a contingent remainder.

If there ever was a case where the words of it seemed to exclude any other construction than that of a *future springing use or executory devise*, this certainly was such a one. The medium of a trust was entirely out of the question, and the *use* was expressly postponed, not merely in point of interest, but in *point of time*, till after payment of debts and legacies; for the devise to Evers Armyne was, *after such time as the debts and legacies should be paid, &c.* and the same words are again used in the devise to Style. There was not even any actual or usufructuary benefit left to any of the devisees in the mean time, as the payment was directed to be out of the *rents and profits*, and consequently no enjoyment left to them till after *such time as the debts were paid*. Besides that, this was a case in which the judges might be expected to go the

utmost length in support of the construction of an executory devise, to prevent the destruction of the limitation to the nephew Style, which was effected by the recovery of the tenant for life, under the construction of a *contingent remainder*.

THERE is one more case I shall notice, which is that of *Strong v. Teat*, in the king's bench in Ireland, and afterwards in the king's bench here, reported 2. Burr. 912.; where upon a devise to the testator's wife of lands to the use and purpose that she might by sale raise so much money as might be sufficient to pay off and discharge such of his debts as should not be paid out of his personal estate, and as to the parts remaining unfold to the particular uses specified in the will, the court in Ireland held, that the reversion in fee of certain settled lands passed by that will; and that the *uses were legal estates executed*, subject to a charge for the payment of the debts (if any), and to a power in the wife to sell for that purpose; and were *good at law*, though devised after an indefinite payment of such debts, &c. This judgment indeed, with respect to the *reversion in fee of the settled lands passing by the will*, was reversed by the king's bench here, and upon appeal afterwards affirmed by the house of lords; but such reversal did not meddle with or affect the opinion of the Irish court, in respect to the *operation of the limitations* after payment of debts. Lord Mansfield, upon the arguments in the king's bench, took occasion to notice the distinction between that case and *Bagshaw* and *Spencer* in relation to that point, and to suggest what shewed the inclination of the court to support those limitations on any admissible ground, if the decision had turned upon that point.

THE two last cases, it is true, were of *legal estates*, or *uses executed*, instead of *trusts* or mere *equitable interests*. But I think they do not for that reason bear less on the present question; for if the law admits a limitation *after payment of debts to vest immediately*, subject to the charge, what should prevent equity from following it, and adopting the same construction?

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I SHALL content myself with one further observation, which is, that in cases of *this nature* there is nothing more to confine the effect of the words *from and after*, or *when*, &c. in construction, to the *time or actual commencement* of the interest introduced by them, than there is in the common limitation of an estate to a man for life, and *from and after his decease* then to another, &c. They only denote the order or course of the several interests connected by them, expressing the priority or preference of the antecedent, and the posteriority or subjection of the subsequent, in point of usufructuary prevalence or effect, without preventing the latter from a concurrent operation in attaching immediately as vested and transferable interest in a present subsisting fund.

CONSIDERING the data furnished by the gentlemen from whom I cannot help differing in opinion on this case, it might be expected that I should apologize for the prolixity of my passage to a conclusive answer to the query proposed to me upon it, which at length is this: I am of opinion, that the recoveries suffered of the trust estates in 1787 are not bad, for the reasons in *messrs. Sidebottom's* and *Holliday's* opinions; but that those recoveries are good and valid, *upon the principles and authorities referred to in those opinions*, and what I have further noticed on the subject.

*Bream's Buildings,*  
May 18, 1790.

CHARLES FEARNE.



## No. VIII.

*The OPINION of the Hon. CHARLES YORKE, touching Lord CLIVE's JAGHIRE, taken by the COURT of DIRECTORS, and read to the GENERAL COURT of PROPRIETORS, held at MERCHANT-TAYLORS HALL, on Wednesday, May 2, 1764.*

**T**HERE are two questions to be considered in this case. The first (in order) is the jurisdiction of the court of chancery. The second is, upon the merits of the demand. I will consider the merits of the demand in the first place; because if lord Clive is intitled in justice to the rent issuing out of the lands granted by Meer Jaffier to the Company, they will (as they ought) turn chancellors against ~~themselves~~, and not think it for their honour that the relief prayed should be denied merely upon a defect of jurisdiction in the court of chancery. "

AND I must own, after considering this question, upon the pleadings and papers laid before me, I have no doubt, upon the right of lord Clive to the rent or jaghire demanded. The grant of the lands to the Company was made by Meer Jaffier in the year 1757 (out of which the rent was reserved to him as nabob of the province). The rent so reserved was assigned by the nabob to lord Clive in 1759. Both grants flowed from the same authority; and therefore in a question between the East-India Company as grantee of the lands from Meer Jaffier, and lord Clive as grantee of the rent, it appears to me immaterial to enter into such objections as might be made, either by the Mogul or the successors of the nabob Meer Jaffier, to the form or substance of those grants. They both claim and derive under the same grantor; and the East-India Company cannot raise an objection against the grant to lord Clive, founded on the want of right and power in the nabob, which  
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will not impeach their own. If lord Clive, as a servant of the Company, had been bound by covenants or bye-laws not to accept any rewards from the Indian princes or inferior sovereigns in the Mogul empire, or from the Mogul, without licence of the Company or Court of Directors (even for services performed to those princes not immediately relative to the commerce of the Company), I should have thought that he would have been bound by such covenants or bye-laws to renounce and relinquish such rewards or advantages; and he might have been liable, in such case, to damages at law, or to an account in a court of equity. But I am of opinion, that the question of right, in this instance, is to be considered not upon the strict absolute merits (according to the laws and constitution in the Mogul empire), but relatively, as between the East-India Company the grantee of the lands from Meer Jaffer, and lord Clive, the grantee of the same nabob, of a rent issuing and reserved out of those lands when granted to the Company. And I am also of opinion, that this question ought to be determined between his lordship and the Company upon the same principles as the like question would be determined arising between the owner of the lands in England subject to a rent, and the grantee or assignee of that rent, in a case where both parties derived from the same original granter. As to the question of jurisdiction, I have already said, that I am satisfied: if the directors and proprietors see the merits of lord Clive's demand in the same light in which it strikes me, they will turn chancellors against themselves. It is for the honour of that great Company to act upon such principles, not only with foreign merchants, trading companies, and foreign states and sovereigns, but with their own servants. I must say, however, that I have no doubt upon the point of jurisdiction in chancery.

THAT court, as a court of equity, acts by its decrees, not *in rem*, but *in personam*; and therefore if the defendant (the East-India Company), against whom an account of the

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MR. YORKE'S OPINION ON LORD CLIVE'S JAGHIRE.

the profits of the land is prayed, is amenable to the process and justice of chancery (as most certainly the Company is), the only question to be considered will be, Whether the relief prayed by the plaintiff is such as can be given by the court against the defendant? Now the relief prayed is merely by way of account of rents and payment of the jaghire, in a case where it is not suggested or pretended, that the servants and receivers of the Company in India are, or yet have been, interrupted in the receipt and perception of these rents; and therefore the bill is brought by lord Clive in chancery, in the same manner, and upon the same grounds, and may be entertained by the court upon the same principles, as in every case of a demand by the grantee of a rent or annuity issuing out of lands, against the owner of such lands, for the arrears and growing payments; which jurisdiction might be exercised between parties resident in England by way of account, whether the lands ~~lay in Ireland~~, or the plantations, or in any other country. The reason is, because the defendant in all these cases, so far as the rent or annuity extends, is to be regarded as a trustee, bailiff, or receiver for the plaintiff. And I am of opinion, that this jurisdiction is exercised merely between the parties resident and amenable to the process of the court; that is, it acts *in personam*, not *in rem*; nor is to be compared with cases of title, where the court decrees possession or title-deeds to be delivered up, or perpetual injunction to quiet possession; or where it directs issues of fact to be tried by juries at common law, upon boundaries, or upon the validity of deeds or wills, in respect of the execution of them, or their validity as instruments. In cases of this latter kind, the court, both by its interlocutory and final decrees, in some sort, gives relief upon the merits of the strict title to the thing in question. But the relief prayed by lord Clive's bill does not involve any such question or consideration.

UPON the whole, I am of opinion with the plaintiff, both upon the merits and the jurisdiction.

April 28, 1764.

C. YORKE F.

*The* OPINION of Sir FLETCHER NORTON\*.

I HAVE always been of opinion, from the first reading of this case, that it was most adviseable for the defendants to settle this dispute with lord Clive upon the best terms they could; for I think, both as to the point of jurisdiction, and the question upon the merits, there can be no defence made to the bill; and I intended to have given a full opinion, with my reasons for it; but being called upon for my opinion in haste this morning, I have not time to do it.

FLETCHER NORTON.

*Lincoln's-Inn, 2d May, 1764.*

Mr. DUNNING'S OPINION.

I HAVE given this case the best and fullest consideration I am able; and I am most clearly of opinion, that the claim has no foundation in the Mogul constitution, is highly prejudicial to the interests of the Company; contrary to every idea of the duties of the relation the plaintiff bore to the Company; and that his lordship's pretensions (if the court had jurisdiction, which I think it has not) are not to be supported upon any principles of municipal law or natural justice. As to the latter part of the question, if the suit should be persisted in, the Company has nothing more to do than to prove such of the circumstances insisted on in their defence, as are not admitted in the bill.

J. DUNNING.

*Middle-Temple, April 30, 1764.*

\* This and the foregoing Opinion were printed in 1773, at the end of Lord Clive's Letter to the Proprietors of India Stock, and the subsequent Opinions were also printed about the same time, annexed to an Answer to Lord Clive's Letter.

Mr. HOSKINS'S OPINION.

THIS case is very uncommon, and is attended with some difficulties. But, supposing the facts contained in the defendant's answer can be proved, and particularly the account given therein of the nature and tenure of the lands granted to the Company, the disposing of the nabob Meer Jaffier and the succession of a new nabob, I am of opinion that the grant to lord Clive, supposing it to have been originally good and legal, and regularly made, is now become invalid; and that either the Great Mogul or the succeeding nabob became intitled to the rents now claimed by lord Clive from the East India Company, and that therefore his lordship has no right to these rents.

I AM also of opinion, that the court of chancery here has no power to determine this question concerning lord Clive's demands, as the same is not of a personal nature, but one for rents arising out of lands in India (the royalty of which is, by the bill, charged to have been granted by the late nabob to the plaintiff, lord Clive, during his life), and therefore ought to fall under the jurisdiction of the courts of the Great Mogul, of whom the lands are held.

AND therefore I think that it is by no means safe or prudent for the East India Company to pay any more money in consequence of the grant to lord Clive, till the hearing of this cause, which cannot be till it is regularly set down after the return of one or more commissions for examining witnesses in India, touching the matters contained in the Company's answer; and particularly as to the validity and effect of the grant to lord Clive.

I AM also of opinion, that if the court of chancery should make any decree in lord Clive's favour, with respect to the rents reserved; yet, considering the uncertain and precarious title which his lordship may have to those lands or rents, he ought to be directed to give good security

## OPINIONS ON LORD CLIVE'S JAGHIRE

rity for such rents as have been paid by the Company to his use, or as shall be paid for the future under such decree; during the time the Company are in the peaceable possession of such lands.

EDMUND HOSKINS.

*Lincoln's-Inn, Nov. 16, 1763.*

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### • Mr. EYRE'S OPINION.

THIS is a very new and a most extraordinary case: I have taken all the time that could be allowed me to think of it. My opinion upon the merits of this case, as they appear in the bill and answer, is, That the title set up by the plaintiff is such as neither the court of chancery, if it had jurisdiction, nor any other court of civil judicature upon the face of the earth, can admit of. The constitution of the Mogul empire must decide upon the plaintiff's claim; as stated by the bill, wherever it can be disputed; and that constitution allows not of alienation of the imperial rents by a subah for any purpose whatsoever. As the cause now stands, I apprehend that the bill must be dismissed for want of a title in the plaintiff, and for want of jurisdiction in the court.

I AM inclined to think, that the plaintiff's true title is the sword; but this he could not rest upon, because the benefit of it in that case must go, according to the law of nations, to those whose sword it was.

IF, according to the constitution and municipal laws of the Mogul empire, a subah's grant was valid against both him and the Mogul, it would remain a question between the plaintiff and the Company, Who should have the benefit of it; and I am of opinion that the court of chancery would not hesitate to pronounce, that a servant, having the care of the Company's affairs in Bengal, and armed

with their power, acquiring by means of that power the grant of a lordship of lands held by the Company, and of a large revenue issuing out of these lands, acquired it for the Company, and not for himself. The Company were in a state of vassalage to the Mogul, in respect of the territory which the plaintiff had procured for them, and which it may be remarked the subah has power to grant, though he has no power to grant the imperial rights. If it was practicable to relieve them from it, it was the plaintiff's duty to procure them that relief. If the grant is considered as a trust for the Company, they are relieved; if not, they only change their master, and become vassals to their own servant. The court of chancery would not endure that a servant should thus take care of himself at the expence of the Company.

THE pretended attornment set up by the bill makes against the plaintiff; he was himself president when the rents were ascertained and the payments regulated. The payments made to his agents after he left India, will weigh very little in such a case. The time the Company took to deliberate upon this great question, the distance and difficulty of communication considered, was not unreasonable; and the not stopping the payments till they had well considered the matter, certainly does not make against the Company.

IT does not appear by the answer, but I take it to be clear, that the Company's charter excludes all persons from acquiring property, &c. in India, without their consent; this will have great weight in the argument, and should be made a part of the case.

JAMES EYRE.

*Middle-Temple, May 1, 1764.*

*Mr.*

## OPINIONS ON LORD CLIVE'S JAGHIRE.

### Mr. THURLOW'S OPINION.

I AM of opinion that the locality of the subject in dispute, which is territorial dominion, and magistratical rank in the empire of Hindostan, is a direct and everlasting bar to the jurisdiction of the English chancery; not merely because the subject lies out of the reach of their process, but because it lies within the full and absolute jurisdiction of another imperial crown.

THAT mere and single circumstance, "that the land lies out of process," raises in my mind no sort of objection to the proceeding of the court; because, while the defendant resides within the realm of England, and so within reach of its process, he may be compelled by that court to discharge his conscience in respect to every kind of contract in which he has bound it. The only serious difficulty which I have seen opposed to this extensive claim of jurisdiction, has been such as sprung from the nature of the subject in question, and from a suggestion that it was bound by different laws and rules of justice from those practised in England, and which the chancellor could neither take notice of here, nor controul there. To avoid this objection, in the case of Ireland, the court argued that it was a conquered country, a member of and subject to the government of England; that appeals lay from thence hither, and so notice might be taken here of their laws. Nay, in other conquered provinces, and even in realms descended to his majesty by relation of blood, it may with some tolerable countenance be insisted, that the keeper of the royal conscience may find real rights, though not by direct process, yet by compulsion, upon the persons of his subjects found within this realm of England.

BEYOND this, perhaps, it is easy to put cases of personal contracts, in which the court would receive evidence of



the laws and customs of a country quite foreign and independant, in order to explain the terms and force of such a contract; because such contracts are in a peculiar and very proper sense said to follow on the person, and the execution of them must move and be obtained from the person.

BUT if the contract were concerning a real subject, always extant in a foreign independant country, always in the actual disposition of their justice, I should think the English court of chancery ought not to interpose in it. First, in respect of the relative inability and incompetence of the court, it is extremely difficult for the greatest scholar, merely by reading, to have that expertness in the laws of a foreign country, which every citizen hath in his own. The greatness of this difficulty is exceedingly manifest in the works of the most eminent scholars in other parts of Europe who have taken occasion to treat of our laws and customs; and yet they are written and stand much commented upon in books. Here the chancellor is supposed able to make himself a complete judge of an unwritten law, merely by hearing evidence concerning it in the course of one cause. Secondly, in respect of the absolute inability and direct incompetence of the court, the subject itself remaining in the disposition of a tribunal over which he has no sort of controul, may be disposed one way there, while he is compelling the party to dispose it another way here, and all the inconvenience would result of clashing jurisdictions.

NOW supposing that according to the constitution suggested for Hindostan by lord Clive, contrary to every history, the nabob of each province had in him imperial and sovereign power and hereditary establishment therein, notwithstanding the emperor's treasury, courts of justice, Duannee judges, and other ministers, have their officers there; and supposing the zemindars possessed their lands by rules of a known law, and in perfect security, notwithstanding

standing the nabobs and omrahs have power, as the bill insists, of taxing their zemindars as they please; and supposing the several instruments, and the whole deduction of the plaintiff's title to be made out in a more unexceptionable manner than it is alledged; I am still (with great reservation of deference to better judgments) of opinion, that the court of Chancery here cannot strip a rent of that relation which in point of title it bears to the land, so far as to decree upon it, any more than an action could be maintained here for the use and occupation of lands in France. I think it would be unequal, if the plaintiff were put to sue in the mayor's court of Calcutta, and the court itself seems to be as incompetent as any court here; and for the same reasons both parties are, with respect to the matter in question, subjects of the Great Mogul, and his court will decide between them with as much indifference as between any other subjects. The cazy of Dehli seems to be the only competent judge on earth of this question, unless the relation it bears to the emperor's treasury makes it fitter for the chief duan to decide.

BUT in the foundation of lord Clive's claim, taken upon the bill and answer, it is very difficult to discern any traces of title which a court, proceeding in the most untechnical way, upon the first and most open principles of justice, could find to take notice of.

HE gives himself general colour, and in an indefinite manner seems to put his capacity of receiving a jaghire upon his title to nobility in Hindostan. The defendants close with his lordship there, and insist more expressly than he had done before, that such nobility is the only capacity for that purpose: his own letters and conduct afford strong ground to suspect, that at the date of the pretended sunnud he was not an emir or omrah.

THE bill alledges, that a jaghire is the necessary consequence of a munsub, which the plaintiff insists is a kind

of warrant to the nabob, authorizing and requiring him to grant a funnud and perwannah for the jaghire; and yet others whose munsubs are less exceptionable, have experienced no such consequences; and the form of his intercession with the court of Muxadavad, proves that was not his intention then. Besides which, other allegations in the bill, every article of his own conduct, and every history of the country prove, that the crown rents are still in the Great Mogul, collected by his vakeels, assisted by the force of the nabob, and exacted by his force; therefore they must flow from him only, and there is nothing throughout the whole bill to support so extraordinary an implication as is now contended for.

BUT to save all difficulties of this kind, the bill alleges that the nabobs have lately usurped throughout the provinces of Bengal, Bahar, and Orixá, and are now in the possession of the Calá lands, and consequently have interest sufficient therein to stake them jaghire; but it doth not insist, that there hath been any formal or acknowledged change in the constitution of the empire. On the contrary, it states the form of the Mogul authority to be still subsisting, and only waiting till superior force may either confirm the Great Mogul in the absolute possession of his rights, or totally deprive him of them.

WHETHER this usurpation be still fluctuating upon the unsettled condition of this barbarous country, or whether the old constitution of the empire be still subsisting, and not without vigour, as the answer insists, and the plaintiff's letters seem to evince, the ground of this claim supposes a legal transmutation of possession, and a court of justice can take notice only of what the laws of the country, alledged and proved, demand; by which it seems admitted on all hands, the plaintiff has no claim; because it seems admitted, that the Calá lands were in the Great Mogul, and it is not alledged in what manner they are taken

taken out of him, neither is the present title in any manner derived from him.

THE answer insists, that it ceased with the life of Meer Jaffer. I confess freely I do not understand that. I cannot discern in any part of the case, as stated to me, a ground of title which can give a just commencement to an estate determinable with the life of the nabob. And if it be considered, as I think it, mere usurpation by the hand of force, participated with his auxiliary, it will fall under the same consideration as the rest of the plundering and fraud committed by the Europeans there: this makes an history not very fit or decent to be discussed by a court of justice in a civilized country.

THE answer likewise insists, that an English subject, and a servant of the East India Company, could not accept such a grant. Now, supposing the government of Hindostan a regular constitution of vigorous and effectual operation throughout all the members of that great empire, the Company are subjects of the Great Mogul, and owe him local allegiance; and lord Clive, by accepting nobility and magistracy, only undertakes to execute those laws which he and the rest of the Company were before bound to observe. This, and the objection mentioned immediately before, seem to spring from a recollection that in fact this great country is a scene of utter confusion, quite void of order and law; which brings the whole to that which I take to be the true question; a question upon the rights of war, as war is practised among savages, a squabble about plunder.

HITHERTO I have forced myself to consider this case upon these faint lines of justice, which are suggested by the bill, and have received so much countenance from the answer, as to be contested and debated. They are indeed suggested by the bill, but very poorly supported; the real confusion of the country is too visible throughout. However, giving all the circumstances insisted upon the fullest weight

weight which imagination can give them, I am still of opinion that the claim made by lord Clive hath no foundation in any idea of justice; and that, if it had, no court of this country can decide upon it.

BUT the question seems still further out of the reach of our laws, and the rules of private justice.

THE subjects of the present dispute are, a title to nobility, territorial dominion, and a stipendiary revenue, in a country where there are no traces of a municipal law, or general justice; or at least where those principles have no practical or effective vigour. Power and property are the temporary creatures of superior force; liberty and security of possession are quite unknown among any but the Gentoos; and the protection afforded them is but a strain of barbarous policy in use among the Moors, in order to make the country worth usurping.

THE Moors have at this time not even the right of conquest over Hindostan, as that the most barbarous of rights is understood in Europe. Many great tracts comprising considerable rajahships are still totally independant, especially towards the north, and among the mountains, particularly those on the eastern side; and many other great rajahs have no mark of dependance except a tribute, which they pay or withhold, as the armies of the empire are near or removed, disengaged or embroiled with intestine wars. In other parts by force, in others by fraud, the rajah and polygar families are destroyed; and the zemindars are their immediate tributaries. This hath happened chiefly in the most open, softest, and consequently the richest countries. In some few of the last countries, the ancient tributes only continue to be paid; but in most the zemindars suffer rapacious and arbitrary exactions. In all, the stipendiary payments forced by the Moors, bear no proportion but to the power and opportunity of oppression. The more warlike nations of the Indians deal with the Moors in the same manner.

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THE Marattas in the north and in the east of Hindostan demand from the whole empire, and exact from such members of it as they can harraßs, a tribute which they call a chout. The Moors, for want of a settled and quiet establishment, do not encrease by propagation in a climate of all others the most adapted to it, but are continually wearing out by their excessive and debauched luxury: and by war, and by intestine treachery, they are as continually supplied by the neighbouring Tartars of all denominations. The Mogul, their acknowledged emperor, sends vast armies of them, all mercenaries, far and wide, under his nabobs, soubahs, and officers, to exact tribute, and to rule in their barbarous rude fashion this not half-conquered country among themselves. There is neither civil order nor military discipline, and consequently no common political object. Every individual is occupied upon the foulest purposes, thinly covered with rude and inartificial dissimulation. A weak viceroy is soon displaced by intrigue, and strangled; an able one struggles to shake off the Mogul. If the Mogul be weak, indolent, or absorbed in vice, the viceroy is independant: a reverse of these characters restores the vigour of the empire for a time, and the tributes go to Delhi again. Towards strangers they are neither bound by humanity, general justice, or the faith of treaties. They have no complement of law but the koran; which is too loose, general, and desultory, to deserve the name of a political institution: even that is corrupted, and the man of power construes it as he pleases.

The Europeans began their trade there in factories; the best, because the cheapest way of trade, if it could have been secure. How insecure these were in a country of no public moral or faith, the history told by the bill evinces. Their defence made an expensive force necessary. In a war amongst the nations of Europe, even that proved too little; and the prodigious force now employed

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in the necessary defence of the trade of Hindostan, could not be supported by the proceeds of that trade to the Company. Force, the bill informs, procured them a great extent of territorial dominions; procured from the Moors territorial dominion over the native Gentoos. This, it is well known, they hold not under the religion of public faith, but under the countenance of the same force which procured it.

UPON this bottom they traffic along both coasts of Hindostan, and a great way into the country, with many immunities from tolls and other impositions. Their place, which is of the last consequence to trade, the only real interest of the Company, they hold ostensibly and avowedly on the terms of paying this tribute to the Great Mogul, which lord Clive now claims. Suppose the Mogul or his vizier should come down with a royal army to claim his tribute, will the contents of this flimsy bill in the English chancery be an answer to those merciless plunderers, who are known to govern themselves by no law human or divine? And if they must be answered by force, what obligation binds the Company to wage war for lord Clive's jaghire? If the Company could have been made secure otherwise, lord Clive ought not to have bound them to such a stipulation; if they could not, how does he propose to insure them?

BUT consider this in a larger way.——

CONSIDER the Company as placed on a small spot of ground, among a people with whom they are not connected in political society; among a people so savage, that they cannot be leagued with them in any certain place under the law of nations, their only real relation being that of fear, force, and reciprocal interest; in how many different ways is this connection, of which the stipend is but one among many articles, liable to be broken?

SUPPOSE the Mogul or nabob, or some independant rajah, lawless ravagers, should see these lands, as cultivated under

under Europeans, an object of their avarice;—suppose the same men, arbitrary princes, should think to reduce the English to the condition of their Moorish subjects—terms, impossible for free men—a war ensues: will the chancellor by his order, of permanent effect in this settled peaceful country, compel the Company to go on paying a tribute to lord Clive, which the law of nations (the only law by which it may be claimed) will not compel them to pay to his pretended sovereign? In how many different ways is such a connection liable to be varied and modified by accidental events which have no relation to the original treaty? Shall the Company be tied down to a certain invariable tribute, instead of being left at large to profit of events as they arise, and deal to the utmost advantage with their capricious enemies?

In short, the terms of such an intercourse as this, while it continues, depend upon force for their continuance; and the questions upon which it breaks ~~fast~~ be decided by the sword. The subject matters of this kind of convention between independant nations, can be submitted to no tribunal but that which decides the events of war, and decrees victory.

FROM what I have already said it follows, by necessary consequence, that, in my opinion, the directors are not only justified, but, according to my ideas of the nature of trust, they were bound in duty to withhold the payment of this tribute to lord Clive. It follows also, that lord Clive is their debtor for so much of it as he hath already received, as being received quite without consideration, and under a mistake. Some circumstances go far to evince that the mistake rested principally with lord Clive, who was their president at Calcutta, and not only apportioned the revenues between the nabob and mr. Clive, but paid them as president of Calcutta to mr. Clive in his private capacity. Then the mistake devolved to lord Clive's agent, mr. Vanstittart, who likewise succeeded him in the

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Company's service; here it hath neither been adopted nor rejected, but hath been preserved in pure deliberation and perfect suspense. However, supposing it, as I do, to have been a mere mistake, if it had been adopted here, the defendant could not serve himself of it to retain the money so paid; and I think the Company should file a cross bill for that money immediately, and take the earliest opportunity of learning from lord Clive, on his oath, what are the true state of the facts, as he means to rely upon them. They should likewise use the most speedy diligence in Hindostan, not only to fix by evidence the state of the public acts at Delhi and Muxadavah, as they are, and have been for these four years last past: but they should prevent, if possible, any new instrument from being introduced there; for though the manners of nobility in this country are exceedingly pure, and abhorrent of all uncandid practices, all the Moors, who must be his lordship's agents, know no object but their interest, and no rule of conduct but deceit.

E. THURLOW.

*Figtree-court, Inner-Temple,  
Monday, December 1763.*

## No. IX.

Sir MATTHEW HALE's PREFACE to ROLLE's  
• ABRIDGMENT, published 1668.

[Directed to the Young Students of the Common Law\*.]

**T**HIS ensuing book is a collection of divers cases, opinions and resolutions of the common law, digested under alphabetical titles, and those titles subdivided into heads and paragraphs. The author of this book intended it only for his own private use; and the publishing of it was intended principally for the benefit of the students of the common law, though it may be also useful for the professors and practicers thereof. By way of preface or introduction, some observations shall be delivered touching these particulars following, *viz.* 1. Touching the collector or author of this book. 2. Touching the subject matter of it. 3. Touching the method of it. 4. Touching the use of it. 5. Touching some cautions to be observed concerning it.

1. TOUCHING the collector or author of this book, the printer (I suppose) in the title-page of it hath affixed his name, and that may very well discharge me of writing much more touching his learning, worth and abilities,

• This Preface partakes in a considerable degree of the reputation and authority of the learned Author's writings on our law (several of which it may here be observed still remain unpublished), and contains, besides an account of the work to which it was originally prefixed, a very excellent outline and general history of the several branches of our law, and directions to the student, pointing out a course of study in that science highly deserving the attention of those who are entering on the profession, and may be read with equal advantage by others who have made more considerable advances in it, as an assistance in arranging their ideas and materials of legal knowledge. *Vide ante*, p. 89.

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## SIR MATTHEW HALE'S PREFACE

which have survived him, and are yet fresh in the memory of very many that knew him; yet, for the sake of posterity, I shall write some observables concerning him, but such only as relate to his profession, because that seems most proper upon this occasion.

HE was a man of very great natural abilities; of a ready and clear understanding, strong memory, sound deliberate and steady judgement; of a fixed attention of mind to all business that came before him; of great freedom from passions and perturbations; of great temperance and moderation; of a strong and healthy constitution of body, which rendered him fit for study and business, and indefatigable in it.

HE spent his time under the bar and for some years after in diligent study of the common law, neglecting no opportunity to improve his knowledge therein; and he had this happiness in relation thereunto, that from his first admission to the society of the Inner Temple, which was 1st Feb. 6. Jac. and till his call to be a sergeant, he had contemporaries of the same society of great parts, learning and eminence; as namely, sir Edward Littleton, afterwards chief justice of the common-pleas, and lord keeper of the great seal of England; sir Edward Herbert, afterwards attorney general; sir Thomas Gardynere, afterwards recorder of London; and that treasury of all kind of learning, mr. John Selden: with these he kept a long, constant, and familiar converse and acquaintance, and thereby greatly improved both his own learning and theirs, especially in the common law, which he principally intended; for it was the constant and almost daily course for many years together of these great traders in learning, to bring in their several acquisitions therein as it were into a common stock by mutual communication, whereby each of them became in a great measure the participant and common possessor of the other's learning and knowledge.

He did not undertake the practice of the law till he was sufficiently fitted for it, and then he fixed himself unto one court, namely, the king's bench, where was the greatest variety of business: by this means he grew master of the experience of that court, whereby his clients were never disappointed for want of his experience or attendance. He argued frequently and pertinently; his arguments were fitted to prove and evince, not for ostentation; plain, yet learned; short (if the nature of the business permitted), yet perspicuous; his words few, but significant and weighty: his skill, judgement, and advice in points of law and pleading, was sound and excellent.

ALTHOUGH when he was at the bar he exceeded most others, yet when he came to the exercise of judicature, his parts, learning, prudence, dexterity and judgement, were more conspicuous. He was a patient, attentive, and observing hearer, and was content to bear with some impertinencies rather than lose any thing that might discover the truth or justice of any cause. He was a strict searcher and examiner of businesses, and a wise discernor of the weight and stress of them, wherein it lay, and what was material to it. He ever carried on as well his search and examination as his directions and decisions with admirable steadiness, evenness, and clearness: great experience rendered business easy and familiar unto him, so that he gave convenient dispatch, yet without precipitancy or surprise. In short, he was a person of great learning and experience in the common law, profound judgement, singular prudence, great moderation, justice and integrity.

I HAVE given this true but short account of this worthy man, yet I fear I have thereby injured his book by raising in the reader concerning it too great an expectation (the worst enemy to the just esteem of any work). I must therefore deal plainly with the reader, and tell him, that though this book is of excellent use and worth, yet it comes far short of the worth and abilities of him that com-

piled it, and therefore is an unequal monument of him. And to excuse that disparity, and to give some allay to the excess of expectation that may be entertained concerning it, I shall subjoin these considerations: 1. The materials of this treatise were not fully his own, but in a great measure collected out of other books and reports. 2. It was only intended for his own private use, and never intended for public view. If he had designed this or any other book for public use, I am confident it would have equalled expectation, and had needed no apology. 3. It is a posthumous work, which never underwent the last hand or pencil of the judicious author; and such works, though when published may advantage others, yet they rarely come out to the due advantage of the author.

2. TOUCHING the subject matter of this book, I shall say something in general, something more particular. In general, the subject matter of this book consists of divers opinions, cases, and choice resolutions applicable unto, and digested under the most considerable titles of the common law. It were superfluous to spend much time in the commendations of the common law of England; it carries in itself, and with itself, a sufficient commendation of itself; and hath had the suffrage of the whole kingdom in all ages for these many hundred of years; for according to it the public justice of this kingdom hath been administered in all times with great success and contentment; yet some few things I shall observe concerning it.

(1.) THE common laws of England are not the product of the wisdom of some one man, or society of men, in any one age, but of the wisdom, counsel, experience and observation of many ages of wise and observing men: where the subject of any law is single, the prudence of one age may go far at one essay to provide a fit law; and yet, even in the wisest provisions of that kind, experience shews us that new and unthought-of emergencies often happen, that necessarily require new supplements, abatements,

ments, or explanations; but the body of laws that concern the common justice applicable to a great kingdom, is vast and comprehensive, consists of infinite particulars, and must meet with various emergencies, and therefore requires much time and much experience, as well as much wisdom and prudence successively to discover defects and inconveniencies; and to apply apt supplements and remedies for them; and such are the common laws of England; namely, the productions of much wisdom, time and experience.

(2.) THE common laws of England are settled and known. Every entire new model of laws labours under two great difficulties and inconveniencies, viz. First, that though they seem specious in the theory, yet when they come to be put in practice, they are found extremely defective; either too strait or too loose, or too narrow or too wide; and new occurrences, that neither were or well could be at first in prospect, discover themselves, that either disjoint or disorder the fabric; and therefore such new models continually stand in need of many supplies and abatements, and alterations, to accommodate them to common use and convenience, whereby in a little time the original is either wholly laid aside, or in a great measure lost in its amendments, and become the least part of the law. Again, were such new entire models of laws never so good, yet it is a long time before they come to be well known or understood, even to those whose business it must be to advise or judge according to them; so that even a more imperfect body of laws well known, at least to those that are to advise or judge, is more of use and convenience to the good of society, than a more perfect and complete body of laws newly settled, and therefore to be newly learned.

(3.) THE common laws of England are more particular than other laws; and this, though it renders them more numerous, less methodical, and takes up longer time for their study, yet it recompenseth with greater advantages;

namely, it prevents arbitrariness in the judge, and makes the law more certain, and better applicable to the business that comes to be judged by it. General laws are indeed very comprehensive, soon learned, and easily digested into method; but when they come to particular application, they are of little service, and leave a great latitude to partiality, interest, and variety of apprehensions, to misapply them; not unlike the common notions in the moralist, which when both the contending Grecian captains most perfectly agree, yet from them each deduced conclusions in the particular case in controversy, suitable to their several desires and ends, though extremely contradictory each to other. It hath therefore always been the wisdom and happiness of the English government, not to rest in generals, but to prevent arbitrariness and uncertainty by particular laws fitted almost to all particular occasions.

If any man shall object, that if there be that excellency in the English laws, what is the reason there have been many changes therein in succession of times? I answer in general, that it cannot be supposed that human laws can be wholly exempt from the common fate of human things, which must needs be subject to particular defects and mutabilities; time and experience, as it hath given it the perfection it hath, so it must and will advance and improve it. But more particularly, the mutations that have been in this kind, have not been so much in the law as in the subject matter of it; the great wisdom of parliaments hath taken off or abridged many of the titles about which it was conversant: usage and disusage have antiquated others; and the various accesses and alterations in point of commerce and dealing, have rendered some proceedings that were antiently less in use to be now more useful, and some that were antiently useful to be now less useful: and it shall not be altogether impertinent to give some instances herein of several great titles in the law, which,

which, upon these occasions, are at this day in a great measure antiquated; and some that are much abridged, and reduced into a very narrow compass and use. 1. Tenures by knight-service, and their appendixes, wardship, value and forfeiture of marriage of the ward, escuage, relief, *aide pur file marier & faire firs chevalier*, *primer seisin*, livery, offices *post mortem*, *traverses interpleder*, and *monstrans* of right in relation thereunto; the several writs of right, of ward, ravishment of ward, *valore maritagii*, *duplici valore maritagii*, and some other appendixes of this nature, made several great titles in the law, and took up much of the business of the old and latter law books; all or the greatest part whereof is now pared off, and become unuseful by the late act for alteration of tenures. 2. Villenage, and the several appendixes thereof, *viz.* enfranchisement, writs *de nativo habendo*, and *libertate probanda*, and the pleadings and tryals relating thereunto, were great titles in the old books, but now antiquated by time: we have rarely heard of any cases of villenage since Crouch's case in my lord Dyer. 3. The titles of profession, deraignment, and the several appendixes relating thereunto, made considerable titles in the old Year Books, but are now wholly antiquated by the statutes of 27. 31. H. 8. and other statutes pursuant thereunto. 4. The title of dower, and its several kinds, was a large title at the common law; and though that title be not wholly abrogated, or out of use, yet it is grown much narrower, especially in relation to great estates, by the common use of jointures, pursuant to the statute of 27. H. 8. 5. The title of descents, to take away entries and continual claim, is very much abridged in point of use and experience, by the statute of 32. H. 8. cap. 33. 6. The title of attornment was a difficult and yet great title, with its appendixes, *quid juris clamat, quem redditum reddit, per quæ servitia?* But it is much out of use, and new expedients substituted in room thereof, *viz.* by fines to uses,



by bargain and sale for a term and release, and by deeds inrolled according to the statute of 27. H. 8.; and by these also the difficulties in execution of estates by livery and seisin, yea, and many of the curiosities of some kind of releases and confirmations, are commonly supplied. 7. The titles of discontinuance and remitter are great and large titles, and indeed full of curious learning; yet these are in a great measure narrowed by divers acts of parliament. Some assurances that at common law were discontinuances, are now made bars; as fines with proclamation, by the statutes of 4. H. 7. and 32. H. 8. as to the issue in tail, though still they continue discontinuances in some cases to him in the remainder or reversion. Again, some that were discontinuances at common law, since, by act of parliament, have lost that effect; as in cases of jointresses, and husband seised in right of his wife, by the statute of 11. H. 7. cap. 20.; in case of bishops, by the statute of 1. Eliz.; in case of other ecclesiastical corporations, by the statute of 13. Eliz. 8. The remedy by assises, and several forms and proceedings relating thereunto, were great titles in the Year-Books; and although the law is not altered in relation to them, yet use and common practice have, in a great measure, antiquated the use of them in recovering possessions, and the remedy by *ejectione firmæ* used instead thereof; so that rarely is any assise brought, unless for recovering possession of offices. 9. Real actions, as writs of right, writs of entry, &c. and their several appendixes, as, *grand cape*, *petit cape*, *suaver default*, *resciet*, *view*, *ayde-prayer*, *voucher*, *counterplea of voucher*, *counterplea of warranty*, *recovery in value*, were several great titles in the Year-Books, but now much out of use; for in most cases, at this day, the entry of him that hath right being lawful, men choose to recover their possessions by *ejectione firmæ*; only in common recoveries the form of such real actions is preserved: and sometimes, though rarely, a writ of *dower* or *formedon*; because ordinarily, where an entail

entail is suspected, a common recovery is had; and sometimes in the grand sessions in Wales they proceed by *quod ei deferreat*. 10. Ley-gager, a great title in the Year-Books; but now, action upon the case being commonly brought for debts upon simple contract, that title comes rarely in use, unless in actions of debt for a bye-law, or a pain or amercement, in a court baron. 11. *Quod permittat*, and assises for commons, ways, &c. *secta ad molendinum*, assises of nuisance, are much turned into trespasses and action upon the case. 12. Garnishment and interpleader were large titles at common law, but now much out of use, for that actions of detinue are much turned into actions upon the case, *sur trover*, and *conversion*. 13. The learning of avowries in a great measure abridged by the statute of 21. H. 8. and the intricacies of process in replevin *retorno habende*, *withernam*, &c. much remedied in case of distresses for rents by the late act of this present parliament. Many more instances of this nature might be given, but these may serve to let us see that process of time much changeth the course and practice of the law, and the reason of such changes. And as time, and experience, and use, and some acts of parliament, have abridged some, and antiquated other titles, so they have substituted or enlarged other titles; as for instance, action upon the case, devise, *ejectione firmæ*, election, and divers others, whereof the ensuing book will give some discovery, are now grown greater titles than formerly.

THE antient Romans, who gloried no less in their laws than in their military discipline, found this to be true; namely, that in tract of time some of their laws grew contradictory, some obsolete, some impractical, some obscure, and the whole bulk of them too voluminous; so that in Justinian's time there was an incredible number of verses and volumes of their laws; whereupon that excellent prince, by the advice of a great council or college of learned men (as once our English Justinian king

Edward the first did by the laws of Wales), reduced them unto a better *compendium*, which makes up now the body of the civil laws. And truly, considering to how great a bulk the volumes and books of the common law have in process of time arisen, how many printed resolutions of the same cases or points, how many disagreeing reports there are touching the same matter, how many seeming contradictory opinions that would be explained or settled, how many titles are disused, it were to be wished that some complete *corpus juris communis* were extracted out of the many books of our English laws for the public use, and for the contracting of the laws into a narrower compass and method, at least for ordinary study. But this is a work of time, and requires many industrious and judicious hands and heads to assist in it.

AND thus having mentioned something in general touching the subject matter of this book, now I shall write something more particularly touching it. The reader, in perusal thereof, will find some few collections out of records and parliament rolls; yea, and some things out of Speed and Skene, but little, and that which in its kind may be useful. But the principal matter of the book consists of collections out of the Year-Books, and the latter reports, formerly printed out of private reports of other men, and some of the collectors' own taking, which were most in the king's bench; from about 12. *Jacobi regis*; there is little in it touching pleas of the crown. It is true, the reader will find many of the cases reported in books lately printed, especially in Mr. Justice Croke's and Sir Francis Moore's Reports; but he will not be without his advantage by this book, touching those very cases. For,  
 1. The variety of reporting of a case many times, gives a clearer reason of the judgment in one report than it doth in another. 2. They are here only abstracted, and the reason briefly given, and also digested into a method that renders

renders them more ready and easy for use; which leads me to the third consideration.

3. THE third consideration is the method of this collection, which will give me an occasion to write something upon these three matters, *viz.* 1. Touching the method of the common law in general; 2. Touching the method of the study of the common law; and, 3. Touching the particular method of this collection.

TOUCHING the former of these, I have many times observed, that men not much acquainted with the study of the common laws of England, though otherwise of good parts, and possibly well acquainted with university learning, pretend two great prejudices and exceptions against the study of the common law, *viz.* 1. That it wants clear evidence of reason, and that the conclusions and resolutions of it are not deducible by such evident rational consequence as is or may be done in other sciences; that it is obscure and perplexed, so that they that think themselves great masters of reason, yea, and many that are much conversant in subtilties of logic, philosophy, and the schoolmen, are at a loss in it, and can make little of it. 2. That it wants method, order, and apt distributions; and this hath bred some prejudice against it, not only in men much addicted to subtil learning, but also in the professors of the civil law, who think that law much more methodical and orderly than the common law. To the first of these I say, that it is certainly true that reason is the common faculty and instrument of mankind for the acquirement, application, and exercise of any knowledge or art; and they that have the clearest exercise thereof are ordinarily the best proficient in them. • It is the same power of reason that with exercise, study, and experience, renders a man a good logician, a good mathematician, a good physician, a good lawyer; but yet the same man that is a good logician, is not therefore presently a good lawyer, mathematician, or physician. Take a man of the choicest natural

tural parts, and turn him upon a piece of Euclid, or upon some parts of the physics or metaphysics, or logic of Aristotle (that great master of reason), he will be to seek to make any thing of it, till by study and time he hath accommodated his reason to those subjects: and although the reason of some parts of the common law be obvious at the first view to every capacity, yet to get a mastery of the full knowledge of it, requires not only reason, but study and industry to understand it; and then his reason will trade upon that stock, and make deductions and inferences upon it, in the same manner as the mathematician doth upon a Proposition of Euclid. But, 2. In matters moral and civil (the common subject of laws), though possibly the general and common notions of them, or whereupon they are founded, are in a great measure common to all men of understanding; yet the applications and particular deductions and conclusions thereof are not so clear, constant, and determinate, as consequences and conclusions in logic or mathematics are: for as the natures of moral actions are in themselves much more indeterminate than the subjects of those arts and sciences, so they most commonly are strangely diversified by infinite circumstances; and therefore men agreeing in the same common notions of justice and morality, oftentimes deduce different conclusions from them, and applications of them, even although interest and partiality of mind (which are very incident to mankind) do not interpose. It was the complaint of the moralist antiently, *notiones communes omnibus hominibus sunt, & notioni nativæ non repugnat; quis enim nostrum non statim bonum esse utile & expetendum, & quavis ratione consecutendum & persequendum? quis non statim justum esse honestum & decorum? quando igitur pugna oritur? in notionum accommodatione ad res singulas:* and therefore the wisdom of laws, especially of England, is to determine general notions of just and honest by particular rules, applications, and constitutions, found out

and

and continued by great wisdom, experience, and time; and thereby to settle that variety and inconstancy of particular applications and conclusions, which, without some established rule, would be found in most men, though of excellent parts and reason, and agreeing in common notions. 3. In things that have their original much by institution, men cannot easily or ordinarily by rational deduction find them out, but only by instruction and education; and yet those things are of as great necessity and use to mankind as other matters more obviously deducible by argumentation. As for instance: in the significancy of speech, why such a composition of articulate sounds and syllables and words should signify such a subject, or such an intelligible proposition; and why one kind of composition in France, and another kind of composition in England, should signify the same thing; why in grammar the various terminations of words should render them of several imports and significations; no immediate reason can be justly given or required, but institution, or custom, which is a tacit institution. And something analogical to this is to be found, not only in the English laws, but in all the laws in the world; wherein, though the first institution thereof was not without great and profound reason, and the same is continued with great advantage to society, and prevention of uncertainty in things, yet it were a vain thing to conclude it is irrational, because not to be demonstrated or deduced by syllogisms. Thus in our law the word *dedi* creates a warranty; the word *concessi* creates a covenant; the word *heyles* required to pass a fee simple in grants and feoffments; lands in fee-simple descend to the uncle, and not immediately to the father; and to the eldest son, not to all the sons; though in some other countries their laws direct descents otherwise; and infinite other instances of like nature may be given, which have their force principally by virtue of institution, or of the common usage of this kingdom, which is a tacit institution, and

and are of great use to prevent uncertainty; therefore, as all the reason imaginable will not render a man a good grammarian, or skilled in any one language, unless he learn it by education, study, or discipline; so a man, though otherwise of pregnant reason, must not be offended if he be not born a common lawyer, nor be master of the knowledge of it without study and experience.

As to the second, concerning the homophicalness of the common law, I shall say this: 1. That the common law is reducible into a competent method, as to the general heads thereof; and every student doth, or may easily form unto himself a general digestion of the law accommodate to his memory and use, 2. But it is true, that all the particulars in respect to their multitude and variety, are not easily reducible into a scholastic method; but they recompense that inconvenience by their particularity and useful application to particular occasions, as is before shewn. 'It is true, the body of the civil law is digested into general heads, which are like common boxes, in which many particulars are placed; but the particulars themselves, their tractates, responses, counsels and decisions, have little other method than our common law books have, or easily may have. Thus much in general for the method of the common law.

(2.) Touching the method of the study of the common law, I must in general say thus much to the student thereof: It is necessary for him to observe a method in his reading and study; for let him assure himself, though his memory be never so good, he shall never be able to carry on a distinct serviceable memory of all, or the greatest part he reads, to the end of seven years, nor a much shorter time, without helps of use or method; yea, what he hath read seven years since, will, without the help of method or reiterated use, be as new to him as if he had scarce ever read it. A method, therefore, is necessary, but various, according to every man's particular fancy. I shall there-  
fore

fore propound that which, by some experience, hath been found to be very useful in this kind, which is this: First, it is convenient for a student to spend about two or three years in the diligent reading of Littleton, Perkins, Doctor and Student, Fitzherbert's *Natura Brevium*, and especially my lord Coke's Commentaries, and possibly his Reports; this will fit him for exercise, and enable him to improve himself by conversation and discourse with others, and enable him profitably to attend the courts of Westminster. After two or three years so spent, let him get him a large common-place-book, divide it into alphabetical titles, which he may easily gather up, by observing the titles of Black's Abridgment, and some tables of law books, and possibly (as shall be shewn) this book now published may be the basis of his common-place-book. Afterwards it might be fit to begin to read the Year-Books, and because many of the elder Year-Books are filled with law not so much now in use, he may single out for his ordinary constant reading such as are most useful; as the last part of E. 3. the Book of Assises, the second part of H. 6. E. 4. H. 7. and so come down in order and succession of time to the latter law, viz. Plowden, Dyer, Coke's Reports the second time, and those other reports lately printed. As he reads, it is fit to compare case with case, and to compare the pleadings of cases with the Books of Entries, especially Kital's, which is the best, especially in relation to the Year-Books. What he reads in the course of his reading, let him enter the abstract or substance thereof, especially of cases or points resolved, into his common-place-book, under their proper titles; and if one case falls aptly under several titles, and it can be conveniently broken, let him enter each part under its proper title: if it cannot be well broken, let him enter the abstract of the entire case under the title most proper for it, and make references from the other titles unto it. It is true, a student will waste much paper this way, and possibly in two



or three years will see many errors and impertinences in what he hath formerly done, and much irregularity and disorder in the disposing of his matter under improper heads. But he will have these infallible advantages attending this course: 1. In process of time he will be more perfect and dexterous in this business. 2. Those first imperfect and disordered essays will, by frequent returns upon them, be intelligible, at least to himself, and refresh his memory. 3. He will by this means keep together, under apt titles, whatsoever he hath read. 4. By often returning upon every title, as occasion of search or new insertions require, he will strangely revive and imprint in his memory what he hath formerly read. 5. He will be able at one view to see the substance of whatsoever he hath read concerning any one subject, without turning to every book (only when he hath particular occasion of advice or argument, then it will be necessary to look upon that book at large which he finds useful to his purpose). 6. He will be able upon any occasion suddenly to find any thing he hath read, without recouring to tables, or other repertories, which are oftentimes short, and give a lame account of the subject sought for; and this leads me to the third thing, viz.

(3.) THE particular method of this book, which is shortly thus: First, it is divided into general alphabetical titles, containing most of the material titles of the common law (other than pleas of the crown); then those titles are many times subdivided into general heads, and those again into more particular heads. The titles of prerogative, trial, and some others, have many subordinate titles, and those titles many divisions under them; some cases are marked with *quære* or *dubitatur*, which for the most part were only opinions, or doubted in the book at large, or by the collector: all that is reported between 21. Car. and the year 1655, inclusively, were opinions and resolutions in that

that court where the author sat, though the court be many times omitted.

4. THE fourth general consideration which I at first propounded is, the uses and benefits of this book, which are principally these. 1. Whereas at this day the books of the law are grown very many and very large, so that many will not have the patience to read them all, the student will in this book have a considerable abstract and collection of most that is material in them. 2. Whereas the abridgments of Fitzherbert and Brook end with the reign of Henry 8. or at farthest of queen Mary, this book takes in most of the new law contained in the subsequent reports, and drawing it down in alphabetical titles, until about the latter end of king Charles I. and some time after. 3. The student or reader may in this book, at one short view, see very much of the body of *learning* that concerns any one title, without troubling himself with many tables or repertories. 4. Whereas in the former division I have commended the making and using of a common-place-book, as the best expedient that I know for the orderly and profitable study of the law, this book will be the *basis* of such a common-place-book, and will not only supply him with an apt method soon learned, but will furnish the student with a liberal stock of particulars, upon which to bottom his farther improvement, and be a common repository for all his future studies; it being printed on purpose with a large margin for the addition of such cases as are here omitted, or that shall hereafter occur under the several heads already in the book; and for the addition of such other titles as shall be found necessary and here wanting. It is true, there are in this book some titles of the old books which are in a great measure antiquated, but they are obvious to view. Upon the whole matter, the pains of this excellent man hath furnished the student and reader with a stock of learning, methodically digested and fitted

to his use, whereby he may improve his knowledge, without great expence of time or labour.

5. I COME to the last of my promised observables, *viz.* the cautions to be used in the reading and use of this book, and advertisements concerning it; which are these: 1. It is a book published for the help and benefit of students, not to abate their industry, but to encourage it: a man that trusts only to another's labours, without his own diligence, attention and study, will never come to be able in his profession, but will disappoint both himself and others.

2. It is but an abridgment; the cases are not all put at large, nor the arguments at large, reported; and although it be an abridgment collected and abstracted with singular judgment, yet where the reports at large may be had, the reader, when he comes to advise, or argue, or determine, ought to consult the reports at large. Some of these are not only abstracted by him, but were also observed, heard, and reported, and some adjudged by him: those of his own observation were principally those of the king's bench, in the 12th, 13th, 14th, and some following years of King James, and all the time of King Charles, and for some time after, which were exactly done and taken: others were only extracted and abstracted out of the private or printed reports of other men, which may be subject to the mistakes of the reporters; but yet easy to be corrected, because they are for the most part now printed.

3. As it is but an abridgment, so it is but a collection; wherein though there be many judgments given by the collector himself, yet most of the judgments herein collected were given by others; wherein it is sufficient truly to report the substance of what he read or heard, without giving his own sense or judgment upon every thing: therefore it may be possible there may be resolutions or opinions crossing one another, or crossed by resolutions of latter times, which yet a judicious reader will make use

of

of without detriment. 4. Although many of the cases and resolutions in this book happened in the time of the late troubles, yet I have reason to believe there are none that concern them; the collector was very cautious herein, and so was the publisher. If any thing of that kind happen to occur, it was overseen, which is not impossible in so large a volume. There are some few titles or cases in the original which are omitted in the print, but they were such as are either now out of use, as touching purveyance and knighthood, or such as are not in their kind so proper for a book of the common law. Upon the whole matter, it is hoped the prudent reader will find much in this book that may benefit him, and nothing that may give just cause of offence. 5. I must again inculcate, that it is a collection that was never intended by the collector for public view; and therefore, if there happen some few observations out of history, or out of some foreign authors, that may seem not so proper for a book of the common law; or some titles or cases omitted that might have been necessary for the completing of an Abridgment; if some cases or titles twice repeated, or if there be not in every thing that perfect order and method that became the work of such a nature, and such a collector, it carries its just excuse with it. An Appendix was intended, that might have been supplemental of some titles, or at least of some cases or observations; but the obstruction of the press diverted it. Those gleanings could not be of such moment as to delay the publishing of the work itself; they may come time enough hereafter, if occasion serve. The equal and prudent reader will be easily able to rectify or excuse the slips above-mentioned, or others of like nature occurring in this book (if any be), and yet find enough in it to improve his knowledge and his time, and to excite in him a just

**SIR MATTHEW HALE'S 'PREFACE, &c.**

esteem of the judgment, learning, and industry of the collector; and a grateful acknowledgment of the condescension of his worthy son (the inheritor of his father's virtues, as well as of his possessions), who, at the request of some that honoured his father, was contented to permit this work to be published for the common good.

## No. X.

## CASE OF PERRIN AND BLAKE,

*In the KING'S BENCH.*

JOHN DOE, *on the Demise of WILLIAM PERRIN and  
THOMAS VAUGHAN, Esqrs. Plaintiff and Appellant;*

HANNAH BLAKE, *Widow, Defendant and Respondent.*

IN November 1758 the plaintiff, John Doe, brought an ejectment in the supreme court of judicature, at St. Jago de la Vega in Jamaica, on the demise of the said William Perrin and Thomas Vaughan, for a plantation and sugar work, and divers messuages, lands, tenements, and hereditaments thereunto belonging, being part of a plantation called Dean's Valley, situate in the parish of Westmorland, in the said island of Jamaica; and the defendant, Hannah Blake, having appeared and pleaded thereto the general issue, Not Guilty, the cause soon after came on to be tried by a jury in the said supreme court, when a special verdict was found as to the title to the said premises; and upon arguing thereof, the said supreme court gave judgment for the defendant.

THE plaintiff brought a writ of error from the said judgment before the governor and council of Jamaica, being the court of errors in that island, which court affirmed the said judgment of the supreme court of judicature; from which judgment the plaintiff appealed to his majesty in council. On the 17th of July 1765, the said cause came on to be heard before the lords of the committee of his majesty's most honourable privy council, when their lordships, having heard the said cause argued by counsel on both sides, were pleased to report to his majesty, that it appearing from the cases and authorities cited, that a material question which arises upon the con-

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struction of the will of William Williams had undergone great litigation in Westminster-hall, and had in different shapes received various determinations, so that the rule of law by which such question ought to be decided, was not thoroughly settled; their lordships thought it highly fit, for the sake of uniformity and certainty, in a matter upon which titles to lands may depend, that a case should be made for the opinion of the court of king's bench, who were to certify to the lords of the committee their opinion upon this question, "Whether John Williams took any " and what estate in all or any part of the premises devised " by the will of the said testator?" their lordships being of opinion, that in case the court of king's bench are of opinion that John Williams was seised in fee, or in tail, of the whole or any part of the premises, that then the judgment complained of should be reversed, and judgment be given for the plaintiff, either for the whole or an undivided part of the premises; in case the court of king's bench should certify their opinion to be, that John Williams was not seised of any estate of inheritance in the premises, in the whole or any part of the premises, that then the appeal be dismissed, and judgment affirmed. Their lordships ordered, that the report be drawn up, without further argument, as the said court shall certify their opinion.

### C A S E .

" WILLIAM WILLIAMS, late of the island of Jamaica, esq. being seised in fee of a plantation, sugar work, and lands thereto belonging, called Dean's Valley, in the parish of Westmorland, in the said island, made his will, bearing date the 13th day of March 1722; whereby, after taking notice of his wife Mary Williams, and his three daughters, Bonetta, the said defendant Hannah, and Anna Williams, he devised as follows: " And should my wife  
" be

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“ be *enfeint* with child at any time hereafter, and it be a female, I give and bequeath unto her the sum of 2000*l*. current money of this island, and to be paid her when she attains the age of 21 years, or day of marriage, which shall first happen, and to be generally educated and maintained out of my estate till her portion become payable, without any deduction of the same or any part thereof. And if it be a male, I give and bequeath my estate, both real and personal, equally to be divided between my said infant and my son John Williams, when the said infant shall attain to the age of 21. *Item*, And it is my intent and meaning, that none of my children shall sell and dispose of my estate for a longer time than his life. And to that intent I give, devise, and bequeath all the rest and residue of my estate to my son John Williams and the said infant, for and during the term of their natural lives; the remainder to my brother-in-law Isaac Gale, and his heirs, for and during the natural lives of my said sons John Williams and the said infant; the remainder to the heirs of the bodies of my said sons John Williams and the said infant, lawfully begotten, or to be begotten; the remainder to my daughters, for and during the term of their natural lives, equally to be divided between them; the remainder to my said brother-in-law Isaac Gale, and his heirs, during the natural lives of my said daughters respectively; the remainder to the heirs of the bodies of my said daughters, equally to be divided between them. And I do declare it to be my will and pleasure, that the share and part of any of my said daughters that shall happen to die, shall immediately vest in the heirs of her body in manner aforesaid.”

AND there was no other disposition or devise of the said testator's real estate, except only a demise of other lands to Thomas Woolery and his heirs, and what is contained in the clause above-mentioned.



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AFTERWARDS, on the 4th day of February 1723, the testator died, leaving issue at his death the said John Williams, his only son and heir at law, and the aforesaid three daughters, Bonetta, Hannah the defendant, and Anna; and the said testator's wife, was not *enfeint*, or with child, at the time of the testator's death, or at any time after his making his said will.

The question therefore is, as aforesaid, "Whether the said John Williams took any, and what, estate in all or any part of the premises devised by the will of the said testator?"

JOHN GLYNN.

THOMAS WALKER.

Feb. 7, 1769.

FIRST ARGUMENT, HILARY, 9. GEO. III.

*Mr. WALKER, for the Defendant.*

MY LORD,

THIS comes before your lordship on a demurrer to the plaintiff's replication. I am for the defendant.

As this case depends entirely on the construction of a will, it will become necessary to enquire into the testator's intention. Upon the reading of the will it appears, that his intention was to give only an estate for life to this son, thereby to prevent the sale of his estate by means of a common recovery; and as this intention is consistent with the rules of law, it must decide in the present question. *Co. Lit. g. b.* and the case of *Newcomen and Barkham* are proofs of this position. Indeed, in a celebrated case reported in *2. Stra. 1125*, it appears that the intention of the testator was not there sufficient to controul the operation of the legal expression *heirs of the body*; but there is a

very

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very great difference between that case and the present. In that case of *Coulson* and *Caulson*, there was no introductory clause indicating his intention, as in the present case. And furthermore, the case of *Lisle* and *Gray* is a strong authority, which was upon a deed, and yet the words of limitation were there construed words of purchase, to effectuate the intention of the parties.

2. Lev. 223.  
Raym. 278.  
Fearn C.R. 104

AND in the case of *Sear* and *Masterman*, the lords commissioners of the great seal would have executed the intention of the testator, had it been sufficiently indicated; which appears from the observations that were thrown out at the time.

Sear v. Masterman, 1757-  
Fearn C.R. 122  
Ambler, 344.

UPON the ground of these authorities it appears, that whatever is the intention of the testator, that is to govern, if manifestly indicated, although the testator may have used inaccurate or unapt words.

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*Mr. Serjeant GLYNN, for the Plaintiff.*

THE question in this case is really of law; for though the law, out of humanity to ignorant men, will allow the most liberal construction to wills, yet the rule must not be laid down without certain restrictions, as that legal language should have its due influence; otherwise you let in a flood of inconveniency, by rendering the rules of construction entirely dependant on the caprice of individuals.

THIS question has been often agitated in Westminster-hall; it is therefore necessary to have it settled; and I cannot but rejoice in the opportunity that now offers.

THE avowed maxim in politics, That property should be settled by general, plain, and certain rules, calls aloud for speedy and conclusive judgment on this head; and the best way of complying with this maxim is, to lay down certain rules which shall contain certain expressions, carrying with them known and determinate meanings, by which means counsel will be able to advise, and convey-

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ancers to settle property, so as to satisfy their own conscience, and to insure their heirs from any future litigation on the subject of their settlements. And indeed, my lord, when we look into our books, we find the weight of authority inclining this way. In our ancient times we know forms were much admired, and legal language countenanced by the courts of justice.

1. Rep. 93.

IN *Shelley's* case, reported by lord Coke, we have a rule laid down which applies directly to the present case: *That in any instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate: if it be limited to the heirs of his body, he takes a fee tail; if to his heirs, a fee simple.*

MY lord, I will not contend that this rule has not been broken in upon; but I will say, that all the cases in which it has been phused have been considered by this court in the case of *Coulson and Coulson*; and there the rule laid down by lord Coke is revived, and has continued inviolate till the present day. Upon the ground of this case it is that I rest; and this case should now be confirmed, not only as it revives the old rule, which is convenient to policy, but for other considerations. As *Coulson and Coulson* was the last case on the subject, and as it was delivered on the most weighty and deliberate thought, conveyancers have made it their land mark, and upon the authority of it have settled many estates. If then this case is overruled at this long interval, what will be the consequence? The conveyancers will be at a loss to give advice, and half the property in the kingdom will be the subject of litigation. *Coulson and Coulson* should therefore be determined and confirmed by *Perrin and Blake*; and to this I could add *Sear v. Masterman*, and another case which was before lord chief justice Wilmot, in C. B. Hilary 1767.

[THE serjeant, being taken ill could not proceed.]

Mr.

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Mr. WALKER, in reply.

SEAR v. Masterman is not applicable to the present case, because there the intention was not sufficiently apparent. In many cases it has been ruled, that the intention is the sovereign guide: that intention appears in the present case; and as it differs from *Coulson* and *Coulson*, there is no authority to give the first taker an estate tail; and therefore the intention is to govern, which gives an estate for life only to J. W. the first taker.

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SECOND ARGUMENT, EASTER, 9. GEO. III. K. B. May, 2, 1760.

Mr. Serjeant BURLAND, for the Defendant.

MY LORD,

THE cases in the books upon this subject are so various, that it is hardly possible to reconcile them; but I conceive, that from the very first chapter of *Coke Littleton* every one will allow this principle, *That although the law has established certain technical expressions for the description of interests in lands, &c. yet if the testator does not use them at all, or in the sense meant by lawyers, still if his intention be clear, his will shall take effect according to that intention.* Indeed, this principle has its foundation in good policy, that it has been applied even in the construction of deeds to fulfil the intentions of the parties.

In the cases *Lisle v. Gray*, and in *Waker and Snow*, and in *White and Collins*, *Pasch. 5. Geo. I.* upon the authority of these cases I might argue, that if the law has allowed deeds to be thus liberally construed, *a fortiori* it will allow it in the case of wills: and when I add the principle above cited upon the authority of lord *Coke*, there

cannot

Raym. 278.

2. Lev. 223.

Ferrens C.R. 103.

Palm. 359.

Comb. 289.

cannot remain a doubt of the truth of the position upon which I ground this argument: That the intention of the testator shall govern, if consistent with the rules of law, although he may have expressed himself inaccurately and without precision. I might here trouble your lordship with many cases which confirm this argument; but as they must be recollected by your lordship, and as they only confirm and strengthen, and do not extend this principle, I pass them over, and rest solely here; which reduces the argument to this question, What is the intention in the present case? Manifestly this: To give such an estate as would deprive the son of barring the remainders. The testator finds an estate for life will do it, and therefore tells us that he means to give it to his son. Upon what I before said I draw this conclusion: The son takes only an estate for life. Exactly in point is the case of *Lennard v. lord Sussex*; and though this was upon a trust, yet that makes no alteration, as one rule of property must run in both courts; and therefore it is an authority to shew, that when a testator expressly indicates an intention that the first taker under this devise shall not bar the remainder, the law says he shall only have an estate for life.

Ven. 516,

AGAINST all this reasoning I suppose the case of *Coulson and Coulson* will be quoted; but the cases are not similar. This case of *Coulson and Coulson* was decided upon the ground of *Duncombe and Duncombe*; and in both it was held, that the estates for life did not merge by reason of the interposition to trustees, &c.

Ec. 437.

UPON the last argument, a case was quoted on the other side which was decided in C. B. Hil. 1767. As my brother *Glynn* did not state it, I will give your lordship what account of it I can,

THIS was a case between *Dobson* and *Grew*. The testator gave to *Grew* an estate for life, and remainder over to the use of the issue of his body, and the heirs male of the body of such issue, remainder over to *Dobson*. This

was

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was adjudged an estate tail, because the greater intention appeared to be, to let in the issue of *Grew* before the devise to *Dobson* should take effect: but as this could not be effectuated without giving an estate tail to *Grew*, the first taker, he was adjudged to have an estate tail.

24 Wilson, 31

UPON this case I would observe, that the general intention of the testator was the guide; and by what fell from lord chief justice *Wilmot*, it is clear that any words would have given way to the controul of the testator's intention. From hence, and what I have before said, I conceive the intention should govern. The intention is to give an estate for life only to *J. W.* and therefore I trust he will be adjudged to take such an estate only.

*Mr. Solicitor-General DUNNING, for the Plaintiff.*

THE case divides itself into two questions; the resolution of which must determine the judgment of the court, 1st. WHAT is the intention of the testator?

2dly. Is that intention consistently explained with the rules of law?

My learned friend contends, that the intention is manifest beyond a possibility of doubt, and therefore does not argue it. I insist, that neither the circumstances taken separately, nor all the will taken jointly, is indicative of his intention beyond a doubt. Let us see what are the circumstances: A devise to one for life only, then a remainder to *Isaac Gale* and his heirs, then to the heirs of the body of his son. These circumstances want an elucidation, inasmuch as the devise to *Gale* is not explained: he may wish to give some interest to *Gale* and his heirs; and, to effectuate that, he may find it necessary to express himself as giving an estate for life only to his son, with remainder to the heirs of that son's body. Taking the whole scope of his will as explained in the introductory clause, it appears to be only a devise to restrain the son from alienating a greater

greater estate than for his own life. This shews, that if the testator had not so explained himself, it had operated to have given his son full power over his estate; therefore this introductory clause only contains a restriction which the testator would have hurst over his son. From hence we see that the intention is very dubious, and should therefore be collected from the legal sense of the words used. But as I do not mean to rest here, I will admit the intention to be clear to give an estate for life; but this I shall contend cannot be allowed, as he has used expressly words of limitation, which brings me to the

## SECOND QUESTION.

“Is this intention consistently explained with the rules of law?”

INTENTION is to be sought for in the construction of a will; but that the testator should be so far indulged as to break through all rules of construction, is a position to which I cannot assent. If an estate be limited to one for life, remainder to his heir, it is a fee in the first taker; and this, whether by will or deed. The intention is clear in that as well as in the present case, and yet the legal sense of the words must not yield to that intention. Then why in the present case? Both stand on the same ground; both must have the same effect. Then will my learned friend say, no cases in the books are against so general an influence? I admit that the books are confused and inconsistent; but I contend, and I will shew, that whatever inconsistency there may have been, yet at this day, in the year 1769, it is a settled point, and well known, that the true line of distinction in all cases upon this subject, is the trust and legal estate. In the first, the intention of the testator is alone to govern; in the second, the legal sense of the words used by the testator.

In the case of *Lennard and lord Suffex*, lord Cowper, in delivering his decree, observes, “If this case had been of a  
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“ legal devise in equity instead of a *trust*, the legal sense of “ the words would have operated instead of the intention.” This very observation is repeated by lord *Harcourt* in the case of *Bale v. Coleman*; and lord *King*, in the case of *Parpillon and Voyce*, determines upon the legal estate exactly as if sitting in a court of law, and allowing the full force of the words used. So says my lord *Talbot* in the case of *Glenorchy and Bosville*: “ *Had it been the devise of a legal estate, I must have followed the legal sense of the words.*”

2. Vern. 670.  
1 P. Will. 14  
Fearn C.R. 9  
2. P. Will. 47

Cases temp.  
Talbot, 3.

If any man will read lord *Harcourt's* argument in the case of *Bagshaw and Spencer*, he must observe the pains, the care and anxiety with which he labours this distinction, and which he makes the ground of his decision. After lord *Harcourt*, the case of *Sear and Mylsterman* comes before lord chief justice *Willes*, lord chief justice *Wilmut*, and mr. baron *Smythe* (at that time lords commissioners of the great seal). This case is a further proof, that in legal devises the words used are to govern, although contrary to the sense in which the testator may mean to use them; and upon this case lord chief justice *Wilmut* observes, that the departure of our courts of justice from ancient maxims, is sure to breed confusion and uncertainty; and it had been better had the old notion of the word *heirs* being a word of limitation, never been broken in upon: so that five successive chancellors lay down the distinction for which I contend; and the last set of great men whom I mentioned concur with them in their decree upon a legal devise.

2. Atk. 570.

Fearn C.R. 123

BESIDES these, the case of *Coulson and Coulson* before this court in 1744, is a very respectable authority, and, corroborating with the cases in chancery, settles it inviolably, That where the testator uses words of limitation, his intention shall not contravene them, however plainly expressed. This case is very much disputed; but, besides what my learned friend mr. serjeant *Glyn* observed upon it, many arguments may be used in support of it. He said, that it

2. S.r. 1125.  
2. Atk. 245.

was



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was a revival of the ancient law: this is what my lord chief justice *Wilmot* so anxiously wished; and as such it is a valuable decision. Besides this, lord *Hardwicke* confirmed it in *Bagshaw* and *Spencer*, saying, "That since the case of *Coulson and Coulson* he would not urge the case of *Papillon and Voyce*." If he thought it was not law, why would not he overrule it? Then it might have been done without inconvenience; but now that is impossible, for conveyancers have settled property upon it; and if it should now be overruled, half the estates in the kingdom would be shaken in the most essential points. Your lordships are therefore now asked to do what would greatly endanger the case of the bulk of mankind in this kingdom, and to do so upon a ground which has never yet been struck upon. For the first, in the year 1769, you are desired to contravene the rules of construction established on good policy and general usage, to support the intention of an individual. It has been said, that the distinction between trusts and legal estates will be attended with inconveniencies. I know of none; no mortal can doubt whether the estate is a trust or a legal one. If a trust, the intention is to controul; if not, the rules of law.

THE devise of the present estate in litigation is a legal devise. The testator has used words of limitation; and as such his intention must be construed according to the legal sense of his words, which give an estate tail to the son *J. W.*, under whom the plaintiff claims; and therefore I pray your lordship's judgment, whereby you will settle this important point, and give additional weight and authority to the well-decided case of *Coulson and Coulson*.

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*Mr. Serjeant BURLAND, in reply.*

THE ground of mr. Solicitor's argument is, the cases in chancery, and the case of *Coulson and Coulson*. As to the first, it can have no weight; one rule of property and construction

construction must run in both courts, or it would be impossible to have any certainty. The law of descents is the same in both courts; and in *Watts* and *Ball* it is laid down, that both courts are bound to decide by the same rules. In *Pybus* and *Mitford*, lord *Hale* observed, that Judges should be *astuti* to discover intention, and to execute it when discovered; so that if a legal expression must controul in a legal devise, it must in a trust, and *vice versa*. As therefore I submitted that the principle laid down by *Coke* was corroborated by many subsequent cases, so I trust that principle cannot be shaken by the authorities mentioned by Mr. Solicitor. As to the case of *Coulson* and *Coulson*, it is not applicable to the present; the intention is so very strongly explained in the present devise. These two grounds failing, leave us quite free to say, that *J. W.* took only an estate for life; and therefore I pray your lordships judgment for the defendant.

I. P. WILLIAMS

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Lord Chief Justice MANSFIELD.

IT is very fit that this matter should be argued again, and all the cases reconsidered. There is a long string of them in the books, but there is a great diversity of opinions. It should be considered, that the different temper of the times may have occasioned considerable difference; and the want of due attention to this has occasioned the courts to run into many absurd distinctions, which had now better be forgotten. The chancellors have in their decrees made many distinctions, particularly between the trust and legal estate; and indeed even in the trusts, between trusts executory and executed: neither of these distinctions are founded in sense. As to the first, courts of equity are bounden by a general rule of law, as much as a court of common law. As to the second, all trusts are executory. It is absolutely necessary to the very existence of a trust, that it be executory, because a trust executed is within  
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the Statute of Uses. This lord *Hardwicke* particularly remarks in the case of *Bagshaw* and *Spencer*: but upon the questions that have arisen in common law there have been many subtilties. In *King* and *Melling*, lord *Hale* mentions a case wherein a person gives an estate to another for life, *et non aliter*; and upon this ground it was ruled an estate for life. So there is *Backhouse* and *Wells*, and many others. These refinements should be all absorbed by enquiring on the present occasion, whether the testator's intention is the sovereign guide; or whether the legal sense of certain technical expressions is to controul that intention, when it appears that he has unwarily and ignorantly used them? That question resolved, will finally decide this matter; and I am therefore very desirous of having it argued and determined by us, and after us by the highest authority.

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THE case stood over for judgment from May 2, 1769, to Feb. 8, 1770. Hil. 10. G. 3. when the Judges delivered their opinions, *seriatim*, to the following effect:

*Mr. Justice WILLES.*

THIS case of Perrin and Blake stands for the judgment of the court. As this action is only brought to take the opinion of the court on the question contained in the case, there is no occasion to state the pleadings. The simple question before us is, "What estate did *J. W.* take under the will of his father?" Before I come to examine this question upon legal authorities, I shall premise a few general observations. In forming my opinion on this case, I have considered the true grounds upon which the general authorities in law have turned, and I have used my utmost endeavours to get a clear sight of every hint or suggestion, as well as of every argument and authority, that I may decide upon the fullest view. However unfortunate I may be in differing with my brothers, I shall make myself easy with  
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this reflection, "that constant unanimity of sentiment alone is no conclusive evidence of integrity in a court." It is the duty of a judge to decide upon the most rational scheme that occurs to him; and he had better adhere to that opinion which he has formed, than give way to the undue influence of others, however erroneous his own opinion may in fact be: my opinion therefore is such as I have formed without any prejudice, and without any regard to the sentiments of another.

IT is an universal notion, that in a commercial country all property should be freed from every clog which may hinder its circulation. In the early times of our history, where feudal policy prevailed in its full extent, every species of alienation was unlawful; but when the rigour of that system wore off, we find alienation grow up and encouraged in its highest degree. In this view of the case, the fiction of common recovery to avoid the statute *de Donis*, is highly commendable. The statute of wills, and the abolition of military tenures, the introduction of commerce in the most superlative manner, with the improvements in conveyancing, make us now view the property of this kingdom as almost entirely disentangled from the clogs which it formerly bore; and upon motives of policy the courts of justice will ever incline against any idea which shall prevent its circulation. A judicious writer (Blackstone) observes to us, the word "heirs" is absolutely necessary in any deed to pass an estate of inheritance: this, says the author, is a relic of feudal strictness. From what I have before said, it is clear, that I shall ever discountenance, as much as I can, any thing which favours of antient strictness and policy, and where I can possibly depart with justice from an old maxim the policy of which has now ceased, I certainly will. And here I will mention cursorily, that in Shelley's case the rule is confined to *Done* or *conveyance*, and therefore by no means applicable to a will: the law acknowledges a maxim which necessa-

2. Burr. 2100.

Pollex. 101.

3. Keb. 42. 52.  
95.

2. Lev. 58.

1. Vent. 214.  
225.

2. Ser. 1125.

2. Atk. 246.

2. Ath. 570.

rily follows from any idea of property, "*cujus est dare ejus est disponere, et donationes sunt stricti juris.*" But wills have always been liberally expounded to fulfil the testator's intention; whatever conditions he lays upon his property should be obeyed by him to whom it is conveyed, and countenanced by the courts of justice. In the case of *Long* and *Laming*, lord chief justice *Wilmot* has this remarkable expression: "The testator's intention is the pole-star by which the court must steer in every decision upon a will, and we must collect that intention from every part of the will, and apply them to each other." In the present case, therefore, reason and humanity are my guides; reason will point out the intention of the testator, and humanity will encourage me to fulfil that intention; and though I shall be ultimately found to differ with a celebrated case, yet I will follow the prudent example of lord *Raymond*, who, speaking of the case of *King* and *Melling*, says, "That case is now determined and settled; as such it must not be shaken, but we will not push an inch further." And if *Coulson* and *Coulson* has been the directrix to conveyances, I must admire that they should place so implicit a faith in a single case; especially as the case of *Bugbaze* and *Spencer*, and my lord *Hardwicke*'s argument upon it, certainly shook, if not to say overruled, it. I come to the present case; there are two questions: 1st. What appears to be the intention of the testator? 2d. Was that agreeable to the rules of law?

His intention is apparent from the introductory clause which governs the whole will: the devise to *Isaac Gale* is a further proof of his intent. From every part of the will it appears that *Gale* was meant as a trustee to preserve the contingent remainders; and though he does not explain it so in terms, yet as this invention of *Bridgeman* and *Palmer* is of a century standing, and being constantly used for the purpose of supporting contingent remainders, if it does appear that the testator's general intent is to use a  
devise

devise in that way, though he shall not have explained it so, yet I think it may be fairly taken for such: after his devise to *Gale*, he gives it to the heirs of the body of his son. If he can give an estate for life to one, and the inheritance to the heirs of the body of the first devisee, and if his intention appears to be so, I shall think that that intention must controul the legal sense of the words "heirs of his body." The principle of the law which says, "that the intention of a testator must govern, if it be consistent with the rules of law," is thus ably explained by my lord *Hardwicke*, in the case of *Bagshaw and Spenser*; "the intention must be consistent with the rules of law," that is, the main object of his intention. The principle does not apply to the legal sense of technical expressions, &c. and in that case there lay the same objections as now, and they were duly insisted on at the bar. We have now, then, got at the question in this case: Whether, or not, in the present case the heirs of the body may be taken as words of purchase? For if they cannot, now I know when they can, will it be said, that because of the rule laid down in *Shelley's* case, they must in this case have the force of limitations? Surely *Archer's* case in 1. Rep. 66, *Law* and *Davies*, are sufficient to shew that there are cases wherein words of limitation have been used as words of purchase; and so is *Roger de Mandeville's*, in Co. Lit. 246. The rule contended for, which is in *Shelley's* case, was pronounced by lord *Coke* upon a deed, and at a time that he was pleading at the bar; and though I shall be for adhering to it in every case literally within, yet it must not be extended an inch. The maxim itself grew with feudal policy, and the reasons of it are now antiquated. The logicians say, "*Cessante causa cessat effectus*;" and surely the lawyer may say, "I will confine an old rule of law within its exact bounds, and extend it as little as is possible!" But in saying this I am warranted by the judgments of our courts of justice; I shall therefore go through these

2. L. Raym. 1561.

2. Str. 849.

Barn. K. B. 238.

1. Co. Rep. 93. b.

Palm. 359.

2. Vent. 311.  
Cath. 154.2. Lev. 22.  
P. 27.  
F. C. R. 104.Chanc. 2. Burr.  
11.

several cases as briefly as I can, as they will be remembered, and more ably explained, by my brothers who concur with me. The first case is *Waker and Snowe*. This case was upon a deed, and there words of limitation were construed words of purchase to fulfil the intention of the parties. This case is mentioned in *Burchett and Durdant*, and accounted law in *Long and Lamington*. Lord chief justice *Wilkes* comments upon this case, and his commentary carries with it great weight and sense. He admits it to be law, and argues from the authority of that case the expediency of construing wills in the same manner: "If the intent (says that learned judge) be in *equilibrio*, let the law controul, if not, let the intention or legal sense of his will, whichever preponderates."

This great case is *Lisle and Gray*, exactly similar to *Waker and Snowe*, and affirmed in the exchequer chamber by the unanimous opinion of all the judges; this is therefore a very strong authority to shew, that superadding words correct the legal sense of certain technical expressions.

UPON a deed too, the case of *Withers and Allgood* in chancery had the same effect; lord *Tillot* observing upon this case, "that the law could not counteract manifest intention." To these cases it may be objected, that the words were added to those which gave a purchase; but lord *Hardwicke*, in *Bagshaw and Spencer*, expressly answers this objection by saying, that "the preceding words only indicated the intention;" and says, "if some words will, why may not others?" There can be no charm nor magic in words, but their effect is constituted by the sense they bear. Upon the ground therefore of these cases, I trust, I might safely rest my opinion; but these cases are confirmed by many subsequent ones, which I will briefly run through. *Burchett and Durdant*: This case went from this court to the house of lords; and there words, to which the law had annexed certain significations, yielded to the intention of the

the testator. Here may be mentioned several cases from lord Rolle's Abridgment. 837. all confirming the same point for which I now contend. After this follows *Beaumont* and *Long*, and *Newcomen* and *Bariban*, or *Frown* and *Barblam*, before lord *Chaper*: upon this case lord *Chaper* observed, that if the law could invariably adhere in all cases to the technical explications, without any deviation, in the most natural and proper case, the common law would become a mere matter of memory instead of being a system of judgment and reason. The case of *Dalhouse* and *Wells* is exactly to this effect; "to the eldest son for life or *he*, for want of issue to the male children:" and this was resolved to be an estate for life: and the court chiefly relied on *or he*, as an indication of the testator's intention. The case of *Robinson* and *Redington* was determined upon its particular circumstances, and I shall presently mention that case more fully. Thus we find that the case of *Archer* was determined upon the intention; and *Clarke* and *Poy* is exactly similar to it. In *Loddington* and *Kyne* the court resolved that *issue* should be a word of purchase. The issue in strict language is in a will the same as heirs of the body: lord *Holt* says so in *King* and *Melling*. And to this, if it be necessary, is lord chief justice *Praeger*'s opinion in *Shaw* and *Wright*, and in *Legatte* and *Sewell*. I cite these cases to shew that issue or heirs of the body may be used as words of purchase. To this I must cite *White* and *Collins* before lord chief justice *King*, in C. B. 5 Geo. I. and *Lowe* and *Davies*. In *Lowe* and *Davies* the words were all in one sentence, and so they are at present. In *Peacock* and *Spencer*, 2. Atk. 89. lord *Hardwicke* observed, that though the words sound like limitations, yet the intention of the testator may controul them. This is exactly the position I am endeavouring to establish. *Long* and *Laming* goes thus far. *Bayshaw* and *Spencer* is exactly in point; but to the last cited case it will be objected, that it was upon a trust; but in this I see no sound reason. There

1. Str. 335.  
Ambler, 3.

2. P. Will. 476.

Cited 1. Burr. 51.

Moor, 593.

1. L. Raym. 203.  
1. Saik. 274.  
3. Lev. 431.  
Fitzg. 24.

2. Stra. 798.  
Fortific. 58.  
Fitzgib. 7  
1. P. Will. 87.  
1. Bq. Caf. Abr.  
394.  
Comb. 289.  
2. L. Raym. 1562.  
2. Stra. 849.  
Bain. K. B. 233.  
2. Vern. 43. 193.  
2. Freem. 114.



is the case of *Austin* and *Taylor* before lord *Northington*, which shews how little he regarded them: it is true, lord *Hardwicke* did go into this distinction; but it was for very wise purposes, to avoid overruling *Coulson* and *Coulson*. But in *Garth* and *Baldwin*, in 1755, he shews us that his sentiments were, "that one rule of property must run in both courts." He quotes *Holart*, 33. where the learned judge says, "no man shall shew me a case where an heir can take as purchaser, without declaration plain." The meaning of this is, that in cases of a devise plain declaration shall be preferred to the operation of legal words. Against this may be cited the case of *King* and *Mehing*: this case turned upon interpretation. *Hale* was of two opinions, and the intention was, *in equilibrio*. In such cases I admit the strict rules of law must take place: just so are the cases of *Duncombe* and *Duncombe*, *Langley* and *Brown*, and *Goodright* and *Pullyn*, distinguished from the present. In the first, the point before the court was a very different one; and it was upon a deed. The court resolved, that the interposition to trustees separated the freehold and inheritance so as to prevent a merger. In *Goodright* and *Pullyn* it was resolved upon the intention not being sufficiently explained; and in such case I have continually said that I would follow the legal sense of the words. Next in order is *Coulson* and *Coulson*; an extraordinary opinion, Lord *Hardwicke* ever dissented with it, and says he, in *Bagshaw* and *Spencer*, "If that case be law," speaking of *Coulson* and *Coulson*: but whether it must now stand or not, it is not apposite to the present case. In *Garth* and *Baldwin* the words are not strong enough. In *Sear* and *Masterman* the question was, Whether he took an estate for life or in tail? Lord chief justice *Willis* observed, "that if the intention had been clear, the technical expression might have given way; but in that case, since it was not manifest, the legal sense must take place." This reasoning is not applicable to the present case; for here the intent is

clear

3. Vez. 646.

Fearn, C. R. 9.

3. Lev. 437.

2. L. Raym. 1437.

2. Str. 720.

Barn. K. B. 6.

Fearn C. R. 122.

clear beyond a doubt. The next case is *Robinson and Robinson*. That case was determined on its own particular circumstances, and thereupon cannot have any influence over the present point. The reasons of the determination are given in master *Burrow's* Reports, 51; but I have procured from lord chief justice *Parker* a copy of the opinion which he delivered in the house of lords upon that very case. The judges have particularly considered what construction the words will bear. It would have been a desirable thing to have fulfilled his whole intention, but that seems impossible. It is a rule of law, "that if the ancestor takes a freehold, and the inheritance is delivered to the heir, the ancestor takes the whole estate." His lordship then goes into the particular circumstances of the case, and concludes with observing, "that as his whole intention could not be fulfilled, the judges were of opinion, that what appeared the most general intent should be complied with:" but this standing on its own particular grounds is not apposite to the present case. Some cases were determined by lord *Northington*. The first was a case which was determined against this general doctrine, "that the intention should controul the legal sense of the words;" but this case not being satisfactory, an appeal was prepared to be carried to the house of lords; but no opinion which the successful parties took encouraged them to answer such appeal, and therefore they chose to drop it. The case of *King and Burchell* was before lord *Northington*. This was determined to be an estate tail, on account of the ambiguity; there being in the former part of the will words which conveyed an estate tail, and some words which sounded in the latter part of it like an intention to give an estate for life.

THE last case upon this subject was *Dodson and Grew*. Upon this case I shall make a few observations. As first, it was determined upon the very principle on which *Robinson and Robinson* was determined, to fulfil the greater

Cited in 2. Burr.  
1102.  
Ambler, 379.

2. Wilson, 374.

part of the intentions. The whole of his intention being impossible to be complied with in the words, it is not similar to the present; and the court, in delivering their opinion, declared they acted upon the ground of compliance with the testator's intention; lord chief justice *Wilmut* observing, "*that the testator's intention was the sovereign guide in the construction of a will;*" and that the legal sense of the words would be of little avail against superior force of intention. I have now gone through all the cases, and I think that upon principles the case is clearly with the defendant. And I further think that the weight of authority is consistent with those principles; and therefore, upon the whole view of the case, I think the intention of the testator must prevail; which being to give an estate for life only to *John Williams*, in my poor opinion he took such an estate only, and of course I must think that judgment must be given for the defendant.

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*Mr. Justice Aston.*

I HEARTILY wish, gentlemen, that I could relieve you from the attention to another long argument; but upon a case of this import it is incumbent on me not only to give my opinion, but my reasons for that opinion.

UPON this case we are to observe, that we are now examining a testator's will, and deciding upon the devise in that will. The first and fundamental rule of law in point is, "*that the intention of a testator is to be collected and allowed, though not expressed in any legal language.*" Let us then consider the intention: this is clearly to give an estate for life. Lord *Hardwicke*, in the case of *Wild and Lewis*, observed, "*that where the intention is not plain to give an estate tail, they will not do it to defeat the limitations and provisions;*" but says, a devise to *A*, for life, remainder to the heirs of his body, is of great influence, and requires strong marks of a contrary intention,

to contravene the legal sense which these words carry. In *Backhouse* and *Wells* the judges relied upon the word *only*; and so said lord *Hardwicke*, in *Robinson and Robinson*. Lord chief justice *Wilmut* likewise observes in *Sayer and Masterman*, "once fix the intention, and the law decides upon it without ambiguity." And so it hath been settled for above a century: every case stands upon its own bottom; others only confound; so that hence we may conclude, that the intention which is clear should govern. But it is objected,

FIRST, That in *Shelley's* case it is laid down, "that if 1. Rep. 93. b.  
"the ancestor takes for life, and in the same instrument an  
"inheritance be limited to the heirs of his body, the first  
"takes the estate tail."

SECOND, That the testator has made such a devise in the very words in the present case, that no words of limitation are superadded to the words devising the inheritance: that the devise is of a legal estate, not of a trust; and therefore that the legal sense of the words will supervene the intention, however plainly expressed. As to the first, I admit the rule in *Shelley's* case to be law; but I deny the consequence, that it is an invariable rule to be applied on every devise. This is an old rule of feudal policy, the reason of which is long since antiquated, and therefore it must not be extended one jot.

THE word heirs is a term of art; it is necessary to be used in a deed, but not in a will. Co. Lit. c. 1. So in the case of estates tail; in a deed it must be created by using words of procreation, as heirs of the body; but, *proli*, *semini*; issue, children will do in a will, Co. Lit. c. 1. from whence we see that the testator need not use terms of art. But the argument now is, since he has used them, they must have their due influence: but it is no conclusive argument; when the law permits an intention to be freely communicated, no reason can be given why terms of art should not be got over. Sir *Joseph Jekyll*, in *Papillon*

**a. P. Will.** 471. *Papillon and Voyer*, said, "*The intention, if lawful, shall govern.*" Lord *Talbot* observed, in *Glenorchy and Bosville*, "*The rule of law is not so strict as to controul the intent.*" In *Sayer and Masterman*, lord commissioner *Willes* observed, "*that the intention should always govern:*" and that case was determined on the non-appearance of intent. Lord keeper *Henley* concurred in this opinion; observing, that such was not an arbitrary opinion, but consonant to justice and reason; that if the intent appears, the testator need not be tied down to legal construction. I know of no rule establishing a contrary doctrine, but on the contrary many cases favour it, as lord *Burking* and lady *Stanford*, *Withers v. Allgood*, &c. and therefore seeing that any words in a will are capable of various constructions, the intention must fix. So is *Lyle and Grey*, *Waker and Snave*, &c. To these it was objected that the intention was shewn by dividing words. Lord *Hardwicke* answers this objection by saying, that these words only indicate the intention; and that if these words were sufficient to do so, any others, carrying with them a plain meaning, would have the same effect. *Wright and Pearson* turned upon the intent. In *Loddington and Kyne* the intent prevailed, and was the ground of the decision in *Robinson and Robinson*. This case was accorded to; and a further confirmation of this is *King and Burchell*, before lord *Northampton*. In *King and Belling*, lord *Hale* says, "*In a will the intention is to be law to expound the testament.*" "*The true ground of decision is the intent; and the true question is, what is that intent? for the interpretation is to shew how he has explained that intent.*" *Dodson and Grew* goes upon the same grounds.

As to superadded words of limitation upon the words devising the inheritance, whether singular or plural, they are immaterial, the true ground of enquiry being the intention. The next argument is, that it is not a trust, but a legal devise. I see no grounds for the distinction be-

tween trusts and legal estates, nor do I think it established. It is laid down in several cases, "that courts of law must decide upon intent, as well as courts of equity." It is sufficient to mention them; *Garth and Baldwin*, *Long and Laming*, *Whatts and Ball*, *Sutton and Sutton*. Courts of equity have frequently upon trusts decreed estates tail; and this upon a very substantial ground, Because the intent of the parties has not been sufficiently explained to contravene the legal operation of the words. In 1741, in the case of *Neocommen and Bethlem*, lord Hardwicke says, "Another point made is, that this is a trust, an executory estate. I am unwilling to rest here, for this looks like setting up a different rule of law and equity." In that year *Vernoy*, M. R. sent *Coulson and Coulson* to this court, when lord Hardwicke confirmed the reference; he said, that since there was no case in the books, nor any authority apposite in that case, he would confirm the reference. There was the case of *Duncombe and Duncombe*, but that case was upon a deed. It is not to be supposed that lord Hardwicke was ignorant of *Duncombe and Duncombe*; but as *Coulson and Coulson* was upon a bill, he thought the cases different. In 1744 this court signed the certificate, agreeable to *Duncombe and Duncombe*. Lord Hardwicke differed with the court of king's bench upon the case of *Bagshaw and Spencer*; and in the course of his argument states sir Joseph Jekyl's opinion, which was contrary to that certified in *Coulson and Coulson*; and then says, "However, since the case of *Coulson and Coulson* I will urge *Papillon and Voyce* no further, &c." No one can say that he confirmed *Coulson and Coulson*; I cannot discover it. Before the case of *Coulson and Coulson* there had been various cases to shew that heirs of the body were sometimes to be used as words of purchase: *Jiffe and Gray*, *Papillon and Voyce*, &c.; and these so well weighed with mr. justice Denrison, that he did not concur in opinion with *Coulson and Coulson*; though, as he found three judges

2. Vez. 646.

2. Burr 1100.

1. P. Will. 108.

2. P. Will. 145.

1. Str. 35.

Ambler, 8.

2. Str. 1125.

2. Atk. 246.

3. Lev. 437.

2. Atk. 570.

judges against him, he acceded to their opinion. I do not mean now to set up lord *Hardwicke's* opinion as law against the decisions of this court; but as *Cauljon* and *Cauljon* was shaken by him, and as it did not run through the several courts of error, it is not a very strong authority, and is therefore open to a free discussion.

LORD *Hardwicke* did, it is true, lay hold of the distinction between trusts and legal estates, to avoid overruling *Cauljon* and *Cauljon*. This appears from what he said in *Garth* and *Bullock*, and in *Legg* and *Scwell*; and from thence it is clear that he rested on *Ba. Shaw* and *Spencer*, upon the testator's intent. As to the arguments drawn from a consideration of convenience towards this distinction, I see no force in them. Whether the estate is a trust or not? is often the subject of litigation: it was so in *Burghow* and *Spencer*. When the court of equity directs a settlement, it is only from an idea of complying with the intention of the parties: so said in *Joseph Jekyll* in *Poppleton* and *Voyer*. If therefore we now comply with the testator's intention, we shall not agreeable to reason, law, and convenience. The system of law and equity will be uniform, and the parties saved much expence and trouble.

Agreeable to this is the case of *Trevar* and *Trevar*. If we do not allow the intention to govern, there will be no possibility for a testator to dispose of his property without keeping a conveyancer in his house. As to my own part, I think, upon the whole of what I have said, that the intent is to controul; and this is, that all the sons should take successively, and all the daughters as tenants in common.

LASTLY, The words restraining in the introductory clause signifying nothing, the whole clause is explanatory of intention; which is consistent with the devises in the other parts of the will. And to shew this, the case of *Leonard* and lord *Suffex* is a respectable authority: there an estate tail was actually devised, and the restrictive clause that the sons should not alien, was holden only as explanatory,

q. Vez. 646

q. Peere Will. 87.

q. Vern. 554.

7. Eq. Cas. Abr.

350.

q. F. Will. 635.

q. Vern. 526.

natory. So in the present case, the clause restraining the power of alienation in the first place cannot, in strict language, be called a restraint on the tenant in tail; and as it is in a will, it must be expounded only as indicating the intention: and therefore, upon the whole of the case, and upon the view which I am able to form of it, I must think that the son *John Williams* took only an estate for life, and that judgment must be given for the defendant.

*Mr. Justice YATES.*

I SHALL ever feel an unaffected uneasiness when it falls to my lot to be so unfortunate as to differ with my brothers, and I shall always conclude that in such case I am in the wrong; but here I will adopt the very delicate apology of my brother *Willes*, "*that judges should always adhere to the opinion they themselves form, without conceding to the influence of any others.*" If in the present case I am in an error, I must say that I have spared no pains to discover the source of my error; but I have formed my opinion after the most diligent enquiry and severest investigation. However, I desire to be understood, that although I must fall into the same chain of reasoning as my brothers have, yet that I come hither prepared to give my sentiments on what the counsel have said, and what has occurred to me, and not as replying to them: such proceeding would be indecent on the bench, and therefore I here solemnly protest against it.

THE general question upon which this case depends, is this:

"WHAT estate did *John Williams*, the testator's son, take under the will of his father, *W. W.*?"

I ALLOW, upon the construction of a will, free scope is to be given to the intention; it is to be collected from various parts, and the whole scheme and design are to indicate



dicating the intention; but the intention must be manifestly clear, and likewise fully consistent with every rule of law. There are cases to be met with, even of trusts, where the testator has holden forth strong marks of his intention, and yet, because the legal words which he had used bore in legal language a contrary import, this intention gave way to the superior influence of law. After you have fixed the intention, it then becomes a question, Whether such intention can be executed consistently with the established rules of law? If it cannot, we had better adhere to the law, and let a thousand testators' wills be overthrown. 'I now shall examine this matter in question; and if I find the intention inconsistent with the rules of law, I shall hesitate no longer to pronounce it vain. In considering the question, let us fix the point: This is a devise of a real estate to *John Williams, &c.* here is no trust executory, no future conveyance to be made, every thing depends on the limitations in the will itself. It is an axiom of our law, "*that wills are to be construed according to the intention.*" This axiom was used at the bar in the fullest sense; and it was said, "*that the intention of the testator, if legal, should be carried into execution, and allowed, in whatsoever words he should have explained such intention:*" but I cannot accede to so unbounded a position. I agree, that in the case of an executory trust it is so; and this out of humanity to the ignorance of a testator, because in this case no rule of law will be violated; but in the case of a legal devise, I conceive allowing so much favour would overthrow the established law, and endanger property considerably.

In giving my sentiments then upon this question, I shall endeavour to maintain two propositions:

**FIRST,** That in every devise of a legal estate the consideration should be agreeable to the legal rules of construction.

**SECOND,** That the rule laid down in *Shelley's* case is one of them. If I should prove successful in these propositions,

position, it will immediately follow, that *John Williams* was tenant in tail, and that the plaintiff is entitled to judgment.

WHAT are the rules of construction here alluded to? It is said that words are not within the rules; but I conceive that entire limitations are not within the favourable rules.

SIR *Joseph Jekyll*, in *Papillon and Voyce*, said, “that the 2. P. Will. 47  
 “testator had not a power of creating a perpetuity, of making  
 “a chattel descend, or of doing that which the law deems il-  
 “legal: but, as to the modes of expression, the law had esta-  
 “blished none for wills; the testator might use such as pleased  
 “him; the law would supply or would construe intirely to  
 “fulfil his intention.” If this be law, a number of authorities must fall. The rule of law mentioned by several writers is this: “A will shall be construed so as to fulfil the  
 “intention of the testator, so far as is consistent with the  
 “rules of law.” The whole, we see, applies to construction; the testator’s will shall be construed to fulfil his intention, so far as such construction is consistent with the rules of law; in other words, “the established rules of construction.” And this is as much necessary to the safety and certainty of the rules of property, as not allowing the testator to do that which is illegal. These established rules of construction form the barriers which keep off uncertainty and vexatious litigations, of disputed titles; and this certainty, so desirable, can no longer exist than whilst we adhere to established rules of construction.

THE favour then shewn to a will is this: That barbarous words shall be supplied; if the devises be imperfect, a necessary implication shall be allowed; but if the limitations be perfect, there is no occasion for assistance, and the expressions used must have their legal effect. These technical expressions are the measures of property in devises; and the law having fixed a determinate meaning, the law will not permit their sense to be perverted, but direct

rect the judges ever to adhere to them without the smallest departure. I come therefore to shew,

2dly, THAT the rule in *Shelley's* case is one of the rules of construction. This rule had its origin in feudal policy, and grew up in days when the law favoured descents as much as possible. I admit that the original reason of it has long since ceased; but I deny that for that reason it must be discountenanced, it having long been the law of the land, and it must continue such without the parliament should interpose; and this, though the reason has ceased, to preserve that noble uniformity for which the law of England has been celebrated, and which is the true criterion of freedom. But, independent of the feudal law, this rule of law is reasonable and just; it is a rule of construction applicable to a will as well as to a deed.

MANY arguments were used at the bar to shew that this will was not within the meaning of the rule in *Shelley's* case; and the words being different require a different rule of construction. The rule does not speak the word *heirs* abstractedly; it does not mean to insinuate that there is any magic in the word *heirs*; it only speaks of the two limitations; to one for life, to his heirs the inheritance. The first gives the estate of freehold, the second gives the inheritance; the freehold is merged in the inheritance, and the ancestor takes the whole estate devised. Those cases which were cited at the bar, where no estate has been given to the ancestor, are inapplicable to this rule.

Co. Lit. 26. b.  
Ambler, 9.

*Roger de Mandeville's* case and *Newcomen* and *Barkham* are, upon this ground, quite out of the present case; in neither was any estate devised to the ancestor.

2. Vent. 311.  
Carth. 154.

THE same may be said of *Barkett* and *Durdant*; the ancestor was living, and the devise was to the heir of that ancestor; and it appearing who was meant by the testator, the heir was allowed to take as if the testator had distinguished him by the appellation of heir apparent. *Long* and

*Laming* /

*Laming* was of a gavelkind estate, and therefore out of the present case. 2. Burr. 1100.

IN *Law* and *Davies* the first devise was a mere surplusage; and the latter words, which were perfect, corrected and explained them. 2. L. Raym. 1561.  
2. Stra. 849.  
Barn. K. B. 238.

IN *Waker* and *Snowe*, and in *Lisle* and *Gray*, the words were there likewise duly explained, and pointed out the meaning of the parties: there was no perfect limitation to one for life, remainder to his heirs, but an estate to the ancestor for life, remainder to the first, second, and other sons, and so on to the heirs of his body: so on was construed *eodem modo*, and therefore intirely out of this case: In *Archer's* case, and in *Cheak* and *Day*, the word *heir* was in the singular number, and a limitation grafted upon it. Palm. 359.  
2. Lev. 223.  
Raym. 278.

IN *Loddington* and *Kyme* the word was *issue*; which may operate either way, as *nomen collectivum*, or as a word of purchase. 1. Rep. 66. b.  
Moor, 593.  
Cro. 313.

IN *Backhouse* and *Wells* the words were for life only, a remainder then to the issue, and the heirs of that issue. This falls under the same reasoning as *Loddington* and *Kyme*; but in *Goodright* and *Pulyn* Mr. *Fazakerly* spoke in argument, and the court did not contradict him, that lord *Macclesfield*, when he delivered the opinion of the court in *Backhouse* and *Wells*, said, if the word had been *heirs* instead of *issue*, the judgment of the court must have been different; and so it was different in this case. And in *Shelley's* case, and in *Legatte* and *Scwell*, in *Peacock* and *Spooner*, and in *Hodgson* and *Bussey*, the determinations were right: there was no estate limited to the ancestor for life; there were only terms for years devised to him; they are not within the rule laid down in *Shelley's* case. 1. L. Raym. 1437.  
2. Stra. 729.  
Barn. K. B. 6.

THE like answer may be given to all the cases upon trusts in chancery: there the whole estate remains in the hands of trustees till final execution of the trust; there the chancellor takes it out of the hands of trustees, and makes VOL. I. Y limita-

limitations agreeable to law, and consonant to the testator's intention. In these cases there was no devise of a legal estate, and it is to them only that the rule *imperatively* applies; from hence it appears to me, that there is no case which impugns the rule.

I COME therefore to the second head of argument, to examine what difference these words make which are used by the testator in the present case.

FIRST, The preliminary clause. It is not difficult to shew that the restriction in this clause is void; it is tantamount to saying, "My son shall not convey a greater interest than for life:" and as he goes on to give him an estate which the law calls an estate tail, that restriction is void; for if the same contains a greater estate limited in the one part than will bear a restriction, the restriction being repugnant is void. Agreeable hereunto is the case of *Fountain and Gauch*, in Bac. Abr. and many others; as in *Backhouse* and *Wells* the word *only* would have been held void, if the testator had devised the inheritance to the heirs of the body of the first taker.

IN *King* and *Melling* lord *Hale* referred to 2. Roll. Abr. 837. An estate was given to one for life, *et non aliter*, and the subsequent remainder to his sons: these words were not like those in the present devise; but *Hale* was himself of opinion, in *King* and *Melling*, that the ancestor took the estate tail.

IN all these cases it is not what estate the ancestor takes, but what estate the heirs take: to let them take the inheritance by purchase, you must design them particularly; and if this is wanting in the present devise, the inheritance could not rest in the issue of *John Williams*.

To get over this, it was said at the bar, that here was a devise to trustees to support the contingent remainder. ~~I see no devise to trustees; I see no contingent remainder~~ to be supported in the words of the will; it is not explained what *Gale* was designed for; and if the argument could

could have any avail, admitting him to be trustee, yet, as that is not expressed, it must not be implied to defeat a rule of law; but here is no contingent remainder to be supported.

IN *Coulson* and *Coulson*, in *Sayer* and *Masterman*, and many others, the devise to trustees in similar points have availed nothing, but have been held insufficient to divide the freehold and inheritance; but in all these cases it was adjudged to be in the ancestor.

It was again said at the bar, that wills are to be construed in law and equity according to intention. To this I have already given my answer, and cited a number of cases: besides these, there is a very long string to mention; some of them shall be sufficient: *Broughton* and *Lampley*, *Atkyns* and *Atkyns*, *Dodson* and *Grew*, and to these we may add *Papillon* and *Voyle*; and in these cases there were the strongest measures of intention. Lord chief justice *Wilmet* observed, that if an estate for life was given to one, remainder to his heirs, and the testator said the heirs should take by purchase, yet the legal operation of the words were too much for the controul of the intention.

UPON this ground it was that *Coulson* and *Coulson* was decided. I can find no objection that lay against it. Lord *Hardwicke* did not over-rule it. Lord chief justice *Wilmet* said, that he thought he rather confirmed it.

ONE more argument was used for the defendant: That the court of chancery had a power to execute the will according to intention. If a legal estate be devised, the court of chancery are obliged to follow the rules of law; but if it be of a trust, the intention may be executed. And here, in my opinion, lies the distinction: When a testator devises a legal estate, he takes upon himself to order the limitations; those limitations, therefore, must be controuled by law for the safe-guard of property. In those cases upon trusts, the will is considered as a set of instructions merely for the purpose of a conveyance to be made by the direc-

2. L. Ravn. 83.  
Lutw. 9.  
2. Salk. 679.  
2. Will. 322.  
2. P. Will. 471.

tions of the court; in this case, no rule being violated, the court is bound to follow the instructions of the testator.

In *Papillon* and *Voyce*, lord King said, "*That he thought that the testator's intention could not govern against the rules of construction, in a legal devise.*"

Cases temp.  
Talbot, 3.

In lady *Glenorchy* and *Bosville*, the same observation is made by lord Talbot; and in that great case of *Bagshaw* and *Spencer*, lord Hardwicke went into these distinctions between a trust and legal estate; and upon this ground he answered the case of *Coulson* and *Coulson*. His lordship says, after stating *Papillon* and *Voyce*, "*However, since the case of Coulson and Coulson, I will urge the case of Papillon and Voyce no further than to shew there is a distinction between the decrees of this court upon trusts, and the judgments at law upon legal devises.*" and coming to consider *Coulson* and *Coulson* particularly, he says, "*No one can have a higher opinion of the judges who signed that certificate than I have.*" But this case differs materially from that: first, there is no clause to save the tenant for life from any impeachment of waste, though, perhaps, that may deserve but little attention; and, secondly, there was no devise of a trust, as in this case.

2. Vern. 526.

In *Leonard* and lord Suffex, the same was the argument of lord Cowper; and he, as well as lord Hardwicke, agreed, that if the case had been of a legal devise, it must have had a different effect. Furthermore, the courts admit a difference between trusts executory and executed; and surely there is sense in this distinction. A trust executory is where the limitations of the trusts are imperfect; where they are entirely perfect the trust is executed. This distinction is expressly laid down in *Glenorchy* and *Bosville*, by lord Talbot; and therefore the true distinction is, that ~~where~~ intention is executory, there it may be followed, not otherwise. In the present case the intention being executed, and all resting on the will of W. W. I am of opinion

opinion that the legal words must govern, and *John Williams* must be adjudged to have taken a fee tail.

As to testators, individuals must not controul the general law which is established by legislative authority and long experience: if we forsake this, we open a door to uncertainty; and when we set up the testator's intention in contradistinction to the legal sense of his words, we confound landed property, by rendering titles obscure, by rendering them dependent on the uncertain term, *the testator's intention*: so confused would it be, that no counsel could venture to give his opinion upon a will. Besides, the expensive litigation which will follow from setting up this rule of intention, will be manifest on recollecting, that as *Coulson* and *Coulson* had been the last case upon the subject, and had been determined with such care and strict attention, conveyancers had taken it for law, and had settled many estates upon its authority. *Coulson* and *Coulson* was determined against the intention of the testator, and it is, in my opinion, law. I have made enquiry of an eminent conveyancer, and he told me that that case had been the directrix of many family-settlements within his own knowledge, and had been generally esteemed good law. Upon principles, as well as on authorities, *John Williams* must be regarded as tenant in tail: his father willed that he should take for life, and that the heirs of his body should all succeed; this cannot be done without calling him tenant in tail.

I HAVE taken up a great deal of time, but I have examined the case as fully as I could; and on every examination I find myself ultimately of opinion, that *John Williams* took an estate tail; and therefore I think the plaintiff must have judgment.



*Lord Chief Justice MANSFIELD.*

THE subject is exhausted, and therefore I shall content myself with giving my judgment without giving my reasons, except it be just to remark upon a few general propositions, in which I entirely concur with my brothers *Ajton* and *Willes*, whose arguments I read over before I came here.

I HAVE served many apprenticeships to this case. I argued *Coulson* and *Coulson*. It was upon my argument that *mr. Ferny* made the case. I argued *Bagshaw* and *Spencer* in every stage of it\*. I gave three opinions upon this very will; and I have determined *Robinson* and *Robinson*, and *Long* and *Laming*; and I think now at this instant just as I did above thirty years ago. I always thought, and herein I agree with my brothers, that as the law had allowed a free communication of intention to the testator, it would be a strange law to say, "Now you have communicated that intention so as every body understands what you mean, yet because you have used a certain expression of art, we will cross your intention, and give your will a different construction; though what you mean to have done is perfectly legal; and the only reason for contravening you is, because you have not expressed yourself as a lawyer." My examination of this question always has, and, I believe, ever will convince me, that the legal intention, when clearly explained, is to controul the legal sense of a term of art unwarily used by the testator.

It is true, in *Stoney's* case the rule is laid down as stated to-day; but that rule can never affect this question. The real rule and meaning of that rule was this: "*if the testator gave an estate for life only to A. remainder to the heirs of A.'s body.*" If the court had said *A.* is only tenant for life, there would have been a contingent remainder to his issue, and then the issue would have been

\* We have been favoured with a more full and correct report of this important case than is hitherto extant, which will appear in a future part of this volume.

# CASE OF FERRIN AND BLAKE, IN THE KING'S BENCH.

liable to be barred by any forfeiture of the tenant for life; and if he made an estate *pur autre vie*, the remainder was gone: so that the best way of complying with the intention was to give him an estate tail, by which means the issue were protected by the statute *de donis*; and if you gave an estate only for life, as it could have no use in the world but to cheat the lord of the feudal services, the law very prudently said, that in such cases it should be an estate tail.

THIS rule is clear law, but is not a general proposition, subject to no controul, as where a testator's intention was manifestly on the other side, and where the objections might be answered. I find no cases in *Broke* or *Fitzherbert* where these matters have come in question; so that we are agreed that the intention is to govern, and that *Shelley's* case does not constitute a decisive uncontroulable rule. This being settled, the question is, Whether in this case he has so explained his intention as to controul the technical expressions? and I agree with my brothers that he has. We know that the invention of trustees to support contingent remainders, is usually attributed to *Bridgman* and *Palmer* since the Restoration: then, knowing that these estates might be limited in strict settlement; it is sufficient for the judges if it appears that the testator (however he has explained himself) had a strict settlement in his eye; so that, from what was said, and from the whole of the will, I concur that the intention of the testator was lawful, and such as may be now supported. If the intent be doubtful, if it be against law, the legal import of the words must govern; but here there cannot be a doubt; the heirs of *John Williams's* body are to take as purchasers successively.

In *Shaw* and *Weigh*, in *Goodright* and *Pullyn*, the whole went upon the interpretation; and lord *Raymond* says, "*Legal words shall not be broken through for the sake of ambiguous expressions.*" The words here are not

strong enough; and so lord *Hobart*, who was contemporary with lord *Coke*, says, "No man shall shew me a case where heirs have taken as purchasers without declaration plain." What is the natural inference from hence? That if the words be not ambiguous, or if the declaration be plain, that the legal sense of the words must yield.

*Robinson* and *Robinson* was penned upon its own circumstances to avoid shaking *Backhouse* and *Wells*, and the other cases; and what my lord chief baron *Parker* said arose upon lord *Hardwicke's* doubts; he wished to make it a strict settlement in *Launcelot Hicks*, but was very much averse to shaking any prior determinations: so that upon these grounds, that the intention must govern, that the intention is manifest, and that *Shelley's* case is no universal proposition, I must agree with my brothers *Aston* and *Willes*. But upon these general observations I should not content myself, if any case can be found establishing a contrary doctrine; which leads me to say that I agree with them, that there is no case which contravenes this general doctrine.

It is true, a great reliance has been made on *Coulson* and *Coulson*, and every argument has been used for the support of it; but this case is a very different one from *Coulson* and *Coulson*. That case may stand; and if ever any future litigation should arise upon a question exactly similar to that, I shall submit to *Coulson* and *Coulson*; though if I was sitting in judgment upon that very will, my determination should have been different. It has been said, "that this case is law, was the unanimous opinion of the courts, is a respectable authority, and always was deemed such." I cannot think so. *Dennison* certainly did not agree with his brothers at first; but however, as he found them strenuously against him, he was very willing to acquiesce upon the certificate being signed.

LORD *Hardwicke*, speaking of *Coulson* and *Coulson*, confines it exactly within its own bounds; and further says,  
 "if

"if that case be law," which was a great deal for him to say: and so little satisfied with it was he, that the last thing he did in chancery was to send *Sayer* and *Masterman* here; and he told me he did it to have *Coulson* and *Coulson* reconsidered. That case of *Sayer* and *Masterman* has been mentioned very often; it was a different case, and has nothing to do with the present. But admitting it to be law, and admitting that it shall ever stand, I cannot see that it is applicable to the present case, here are such strong marks of intention. But it was said, that the conveyancers had rested upon *Coulson* and *Coulson*, and I know who was meant: but it is impossible that where a man meant to give an estate tail to another, he would give it him for life, remainder to trustees to support contingent remainders, remainder to the heirs of his body; it is trifling with words to suppose it.

THERE is yet a fifth proposition in which I have a great deal of experience, and wherein I perfectly agree with my brothers; and it is, that there is no sound distinction between the devise of a legal estate, and of a trust; and between an executory trust and one executed: all trusts are executory; and in every shape that a will appears, the intention must govern.

I ADMIT that there is a devise to *John Williams* for life, and in the same will a devise to the heirs of his body; and I agree that this is within the letter of *Shelley's* case; and I do not doubt but there are, and have been always, lawyers of a different bent of genius, and different course of education, who have chosen to adhere to the strict letter of law; and they will say that *Shelley's* case is uncontrollable authority, and they will make a difference between trusts and legal estates, to the harrassing of a suitor; for great are the doubts frequently which is or is not a trust; and the searching for the representative of the trustee is attended with inconvenience, trouble, and expence. And if courts of law will adhere to the mere letter of law, the great

great men who preside in chancery will ever devise new ways to creep out of the lines of law, and temper with equity. This is certain from the proceedings on the statute of uses, which will render the lines of property very dubious and uncertain, by difference in judgment in law and equity, to the much dreaded introduction of uncertainty in landed property, and confusion in the titles of the owners.

MY opinion therefore is, that the intention being clear, beyond doubt, to give an estate for life to *John Williams*, and an inheritance successively to be taken by the heirs of his body; and that his intention, being consistent with the rules of law, should be complied with in contradiction to the legal sense of the words used by the testator so unguardedly and ignorantly; and as the defendant claims under such settlement, I am of opinion that she is entitled to the judgment of the court; and as my brother *Jones* stands alone, judgment must be so given for the defendant.

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*UPON the Judgment of the Court of King's Bench in this Case, a Writ of Error was brought in the Exchequer Chamber, which was twice argued at Serjeants' Inn; when Nares, Blackstone, Gould, Perrot, Adams, and Chief Baron Parker, were for reversing that Judgment; and Smythe and Lord Chief Justice De Grey were for affirming it; but the majority being for reversing, the Judgment of the Court of King's Bench was accordingly reversed. An Appeal was afterwards brought in the House of Lords on the Reversal in the Exchequer Chamber, but was not proceeded upon.*

*The Case in the King's Bench is stated in Burrow and Blackstone's Reports, but the Arguments here printed have not been hitherto reported; the Substance of them, however, and of the whole Case, is given in Mr. Fearne's excellent Treatise on Contingent Remainders.*

*Mr. Justice Blackstone's Argument in the Exchequer Chamber is printed in Mr. Hargrave's Collection of Law Tracts.*

## No. XI.

CASE of the DUTCHESS of KINGSTON's WILL  
made in FRANCE; with the OPINION of MONS.  
TARGET thereon.

TRANSLATED FROM THE ORIGINAL FRENCH.

THE undersigned counsel, who has seen a copy of the will of the dutchess of Kingston made in France the 26th of October 1786; and a memorial annexed thereto, consulted on the validity of this will, and on the questions proposed in the memorial, is of opinion, That the first and principal difficulty is to know, Whether this will is valid, and ought to take effect in every country where, the testatrix may have left any property? And as this question deserves a very attentive discussion, it is necessary, in the first place, to lay down some general principles.

THE power of making a will is a benefit of the civil law; for, according to natural law, the right in the proprietor to dispose of his property ought to end with life. A man cannot transfer, when he no longer exists, property which death has deprived him of; nevertheless this power is almost an universal right, and, being founded on the practice of almost all nations, ought to be favourably received.

THE diversity of laws and statutes on this subject has rendered it necessary to distinguish three things: *the capacity of the testator; the power of disposing of the property, and the form of the will.*

THE capacity of the testator depends on his personal qualities; and it is the law of the country to which he belongs, which, governing his person, gives him this power: therefore the necessary age to enable a person to make a will is by different customs differently fixed.

IT is to the custom of the country to which the testator belongs, that it is necessary to conform; it is a personal law.

THE power of disposing of property, either in entirety or of a certain part, depends on the law of the country in which it is situate; and that is what is called a *real statute*.

LASTLY, the form of a will consists in establishing a proof of the intention of the testator in the manner prescribed by the law; and it is also on this point, that local statutes have dispositions differing from each other.

IT has been asked, *What is the law that governs the FORM of a will?* It cannot be said that it is the law of the place where the property is situate; for immediately that the testator derives from that law the capacity to dispose either of the whole or part, the intention of the statute is fulfilled. *It could not be required from a testator possessing property under three or four different customs, or in so many different countries, that he should make three or four wills in different forms:* this would be to render the exercise of this valuable privilege impracticable.

WE must therefore look to another principle to determine the law which ought to govern the form of a will.

THIS question has much occupied, and often divided, the learned; but on this subject a distinction presents itself which seems drawn from the nature of things, and which has thrown a new light on jurisprudence: Where the testator is obliged, in making his will, to employ the ministry of public officers, who, by their character, imprint it with the seal of authenticity; and where the law of the testator's country, which governs his person, gives him the power of making his own will without the intervention of any public officer, so that he is himself the minister of his own disposition. And such is the olographic testament which, for all solemnity, requires that the testator should write, date, and sign it with his own hand.

IN the first case, when the assistance of public officers is necessary, it is natural enough that the law of the place  
where

where the will is made should govern the form ; for it cannot be required of an officer who exercises his function in a certain place to which he is attached, that he should borrow the form prescribed by a law to which he is a stranger, of which he may be ignorant, and to which he is not obliged to submit.

THE form therefore of a will becomes, in this case, a statute in some measure personal to the officer before whom the act is passed ; and from thence this famous axiom, *Locus regit actum* : and though this rule is not literally written in the law, yet it is so natural, and so conformable to order, that it cannot be doubted but that every will, for which it has been necessary to have recourse to the ministry of public officers, can only be good inasmuch as it is conformable to the law of the place where it is passed. But in consequence of the same distinction, should it not be said likewise, that when the testator, according to the law of his own country, has a right to make his own will, the place where he judges proper to make it becomes indifferent, because there is no public officer who ought to concur ? Nevertheless, a difficulty has arisen on that point, but which, well cleared up, only confirms the principle.

- IT could not have been reasonably contested, that a testator who, according to the custom of the place where he is born, and where he has his habitation, has the power to make an olographic will, has not a right to make it in the same form when he finds himself in another place, though the olographic will is not admitted there, because it is a power that he carries with him, inherent in his person, and to which the ministry of public officers is absolutely a stranger ?

BUT it has been affirmed, that it is not similar, where a testator is born and is subject of a country where the olographic will is not allowed, and being in a place where it is authorised, makes one in this form. It has, in such case, been objected, that the law of his country not giving



ing him this capacity, which is personal, he cannot have it in any place to which he removes, nor renounce his personal statute to adopt that of the place where he shall accidentally be.

THIS opinion has had many partisans, and even seems to be adopted in some decrees; but though it still may be looked on as problematic, there is too great a difference between this and the preceding kind to confound them one with the other.

For, if a testator of a country where the olographic will is authorized has a right to make such a will in every country, it does not follow that he to whom the law of his country has refused this right can emancipate himself from the law which governs his person, by leaving his country: for if this kind of statute is inherent to the person, in the first case it authorizes the olographic will, and in the second case it ought to outweigh the statute of the place where the will is made. But whatever may be said of the second kind, which hitherto has not been thoroughly decided in jurisprudence, *it must* always be agreed, that the testator who, according to the law of his own country, has a right to make an olographic will, may make such will in any place where he shall happen to be, without being subject to the law of the place where he accidentally makes his last disposition; and this is a point of which we must not lose sight in the application to be made of these principles.

IT was in France that the dutchess of Kingston made the will in question. Although she was not naturalized a Frenchwoman, she had obtained, by letters patent, registered in the parliament of Paris the 7th of August 1777, the capacity of acquiring and possessing property in the kingdom, and to dispose thereof by gift, last will and testament, or otherwise as she pleased, and in favour of such persons as she should judge proper, whether she lived in the kingdom or out of it.

THEREFORE the dutchess of Kingston, though a stranger, and not naturalized, enjoyed in France all the advantages of civil right; and as her capacity to make a will cannot be called in question, all the difficulty is reduced to learn, Whether the form which she employed in making the will in question is regular?

If she had been obliged to follow the form established by the custom of Paris, this would be evidently null.

In effect, this custom admits but two sorts of wills: that which is olographic, the whole of which ought to be written, signed, and dated with the hand of the testator; and that which is passed before two notaries, or one notary and two witnesses.

THE will which the dutchess of Kingston made at Paris is not written with her hand, she has only signed; therefore it has not the necessary formality of an olographic will. On the other hand, it has not been received before notaries, there are only three witnesses who assisted at the execution; but these are private persons, who could not impress with that character of authenticity required by the custom of Paris. According, therefore, to the law observed at Paris, being clothed with none of the formalities which are observed there, it would be absolutely null.

BUT the intention has been to conform to the law of England: it is therefore necessary, in the first place, to know, if this English form has been exactly followed; and, secondly, if the conformity of this will with this foreign law, has rendered it valid in France, though null if judged by the law of France.

It would be needless to enlarge here on the first point; for, according to the statutes quoted by Mr. Blackstone, the nuncupative written will is used in England, which requires but three witnesses to assist and sign with the testator; and those witnesses may be private persons; the presence of a public officer is not necessary. Now this has been exactly observed in the present case; for the testatrix

tatrix declares she has put her name on the fifteen first sheets of paper of which the will is made, and on the sixteenth that she has put her name and placed her arms; and there are three witnesses who have signed with the testatrix, and in the presence of each other.

THE English law requires nothing more for the form of the nuncupative written will: in effect, it appears by the memorial for consultation, that those who drew it up had no doubt but the will would be deemed valid in London, where these English formalities are better known than they can be in France.

WE must therefore return to the single question, Whether the circumstance of this will having been made in France can alter its validity?

THE principles here laid down do not permit a doubt to be raised on this subject.

THE dutchess of Kingston, born an Englishwoman, does not appear to have abdicated her country, or her home: she obtained from the king leave to acquire and possess property and dispose thereof; but she was not naturalized a Frenchwoman: therefore, though she died in France, she died an Englishwoman.

HER person therefore, at the date of her will, could not be governed, as to the personal statutes, but by the English law; and the letters patent which had been granted to her gave her the same power of devising that she would have had in England.

If the English law required for the composition of a will the assistance of a public officer, she ought to have employed, for the will which she made, the assistance of a notary; without which she would have broke in upon the formality established by the statutes of her country: but that law requires only the presence of three witnesses of any kind; she might choose these at Paris as she might have done at London; and as soon as she had fulfilled the formality

formality prescribed by the law of her country, it must be concluded that the form of her will was regular.

THIS case may be compared to that of a testator born in a province where the olographic form is admitted, and who happens to be in another province where this form is not admitted, as he carries with him the power of making a will without the help of any public officer, in writing it himself: so the Englishman in France needs not call in a public officer to make his will, provided he is assisted by three witnesses of any kind. This is the natural effect of the permission granted in 1777 to the dutchess of Kingston, by letters patent enregistered in the parliament.

HER situation in France was similar to that of the English who, following king *James II.*, took refuge there: a question was raised, Whether they could make a will, and in what form? As they retired there with the leave of *Lewis the Fourteenth*, that monarch decided, in their favour by a letter which he wrote to mr. *le Camus*, lieutenant civil, the 1st of March 1704; and this decision has again been confirmed by a similar letter written to the chapter of Saint Peter at Lille, the 5th of March 1741. . .

THESE decisions are traced back in the new collection of *Denizart*, tom. 1. verbo ANGLAIS; and in *Le Traité de la Réalité et Personnalité des Statuts*, by mr. *Boulonnois*, tom. 1. tit. 2. chap. 3. observation 21. page 435. This last author expresses himself thus: "The English who, following king *James the III.* sheltered themselves in France, have been maintained in their laws; they may make wills, as to the form, as it is practised in England; and their wills, clothed with this formality, are esteemed valid in France."

THIS resolution ought to be looked upon as a rule of the right of persons, which requires, between different kingdoms, that reciprocal condescension to facilitate to the subjects who pass from one to the other, the free exercise of their natural and civil powers; one of the principal



legacies are paid, the surplus will belong to the next of kin, unless, by the advantage of representation, some of the kindred in a farther degree take place of those in a nearer one, which will depend on the custom of the places where the property is situate.

NOTHING after will remain but to give an explanation respecting the acquisition that the dutchess made, since the date of her will, of the estate at St. Añse, which Monieur, the king's brother, sold her for 50,000*l.* sterling, payable by instalments; the first of which, of 15,000*l.* has been paid, and the others are not yet acquitted.

It is asked, Where does the property of this estate vest, according to what has been declared? The sale was perfect; for the thing, the price, and the consent, *res, pretium, et consensus*, are what constitute the essence of this kind of contract; to perfect which, it is not necessary that the price should be entirely paid; it is sufficient if a part is paid, and that terms have been agreed upon for the surplus.

THEREFORE, according to the general principles on this matter, the property of the estate at St. Añse actually vests in the inheritance of the dutchess of Kingston; unless there is some extraordinary clause in the contract which the underwritten counsel has not seen.

MONSIEUR has, certainly, a privileged mortgage on this estate for what remains due of the purchase money. It belongs to the wisdom of his counsel to direct this action, upon which the undersigned counsel is not required to explain himself.

Deliberated at Paris, 23d of Feb. 1789.

DOUCHEMENT NOICHETTE TARGET,

## No. XII.

CASE of BUCKWORTH and THIRKELL, in the  
KING'S BENCH.

TRINITY, 25. GEO. III.

SPECIAL CASE RESERVED AT THE TRIAL OF A RE-  
PLEVIN AT THE LAST ASSIZES FOR CAMBRIDGE.

A devise to A. in fee, and if she dies before 21, without leaving issue, limitation over. She has issue, which dies. Her husband shall be tenant by the curtesy.

THAT Joseph Sutton, being seised in fee of the premises in question, by his will dated the 22d of August 1769, devised as follows:—"Also I give, devise and bequeath all and every other my real and personal estates unto John Cresswell and Edward Preston, their heirs and assigns, for ever, to the several uses and on the several trusts following: First, as to for and concerning all my estate at Leverington, Parson's Drove, in the Isle of Ely and county of Cambridge, called High In-homs, in trust to receive the rents and profits thereof, and apply the same to and for the use, maintenance, education and cloathing of my grand-daughter, Mary Barrs, until she shall arrive to the age of 21 years, or be married. And from and after the said Mary Barrs shall have attained her age of 21 years, or be married, I give and devise all my said lands and premises in Leverington aforesaid unto the said Mary Barrs, her heirs and assigns, for ever. But in case the said Mary Barrs shall happen to die before she arrives, at the age of 21 years, and without leaving issue of her body lawfully begotten, then from and after the decease of the said Mary Barrs without issue as aforesaid, I give and devise all my said estates at Leverington unto my grandson Walter Barrs, and to his assigns, for his natural life." Remainder over.

TESTA-

TESTATOR died four years after making the will.

IN March 1781, Mary Barrs, the granddaughter and devisee, then being of about the age of nineteen, married Solomon Hanford.

MARCH 1782, a child was born of that marriage, which died 25th of August 1782.

ON the 28th of August 1782, said Mary Hanford, the mother of said child, died under the age of 21 years, and without leaving any issue.

SOLOMON HANSORD, the husband, during the coverture, received the rents of the premises in question, in right of his wife.

WALTER BARRS was at the time of the death of the testator, and now is, his sole heir at law.

QUESTION reserved for the opinion of the court:

“WHETHER, under all the circumstances of this case, and the events that have happened, the said Solomon Hanford is entitled by the curtesy to be tenant for life of the premises in the declaration mentioned?”

PLAINTIFF claims under Walter Barrs; defendant under Solomon Hanford, the husband of Mary Barrs, deceased.

FOR the plaintiff it was contended, that Solomon Hanford was not entitled to be tenant by the curtesy. That under this devise Mary Barrs became entitled, on her marriage, to an estate in fee simple, defeasible by the conditional limitation over on her dying under age, and without leaving issue living at the time of her death; and that to entitle the husband to be tenant by the curtesy, it is necessary that the wife be seised of an indefeasible, unconditional, and unqualified estate in fee simple, or in tail. Here the words of the will *without leaving issue*, must mean *issue living at the time of the death*. The event, therefore, of her dying without leaving issue living at her death,



is the condition on which the estate in fee simple is to be defeated; and in the event which has happened, her estate determined not by the expiration of its original extent, not by the limitation being spent, but by a condition or express limitation, operating as a defeasance of it; for the original estate was a fee simple\*.

BOTH these cases recognize the distinction between an estate where the limitation is determined or spent, and an estate which is defeated by a condition. \*

In general, the same rules apply to the right of dower and the right of curtesy.

Co. Litt. sect. 52, 53. definition of dower and curtesy, uses the words where the issue may, by possibility, inherit the same tenements, "*et jacob an estate as the wife or husband bagd bath;*" which are material as to restraining the generality of the rule commonly laid down, that the husband shall be tenant by the curtesy, wherever the issue might, by possibility, inherit.

As to dower, 1. Roll. Ab. 676. F. 1.

BEFORE the statute *de Donis*, estates tail were conditional fees; but on the birth of a child the condition was considered as performed, so as to become an absolute estate to three purposes: 1<sup>st</sup>, that the donee in tail could alien; 2<sup>dly</sup>, could forfeit; 3<sup>dly</sup>, it was defendible to the issue of a second marriage, and of course gave curtesy to the husband of a second marriage. &c.

THE statute *de Donis* took away the power of alienation and the curtesy of the second husband, but left the right of the husband of the first marriage to be tenant by the curtesy, as it stood before the statute; that is, as being the husband of a woman whose estate on condition was become absolute by birth of a son. This accounts for husbands being tenants by curtesy of estates tail; but it

\* Pain and Sams, Goldbur. 81. Leon. 167. 1. Anderf. 184. Boothby and Vernon, 9. Mod. 147. &c.

explains the difference between estates tail and estates defeasible on condition, such as the present, and proves how inapplicable the case of an estate tail is to the present estate, as to the right of the husband to curtesy\*.

BUT the court held, that the husband in this case was entitled to be tenant by the curtesy, and gave judgment for the defendant.

*Lord MANSFIELD said,*

THE right of tenant by the curtesy existed at the common law; and the necessary points are, that the wife be seized of an estate of inheritance, which, by possibility, might descend to her issue, and that issue should be born. Estates at common law were either absolute or conditional: curtesy was incident to both, and existed when the wife died without issue inheritable, which let in the reverter. As to fees conditional, the estate did not become absolute by birth of a child inheritable; but, in odium of perpetuities, it was for a special purpose become absolute, if issue were born, *i. e.* the donee might alien, the estate was to descend and revert according to the entail, if not aliened. At common law, the only modification of estates expressly limited was by condition; the statute of uses introduced more qualifications of estates expressly limited. About the reign of Eliz. and Jac. I. many cases in odium of perpetuities were determined, to prevent and defeat such an application of the statute of uses. The courts leaned against contingent limitations over; but having gone a great way on that side, they began to think they went too far. New devices were contrived at the time of the troubles, and practised after the Restoration; trustees to preserve contingent remainders, and executory devises. It is not long that the bounds of them have been settled: it was in my time that the courts first held they might wait

\* See 2. Inst. 373. S. Co. 69. b. 36. a. Paine's Case, Bro. Ab. 296. pl. 71. Fitzh. Ab. 339. b. pl. 66. Plowd. 241, 242.

**CASE OF BUCKWORTH AND THIRKELL, IN THE K. B.**

during a life in being, and 21 years after. Now it is contended, that this is a conditional limitation: it is no such thing; there is no condition in it; it is a contingent limitation. If it is a limitation, it does not defeat the right of the husband to be tenant by the curtesy: the husband may be tenant by the curtesy, though the estate is spent. But how was it when she was alive? Here the wife was seised in fee simple during her life, and such an one as the issue might inherit, if they had not been disappointed by death.

**JUDGMENT FOR DEFENDANT.**

## No. XIII.

CASE of WILLOUGHBY and WILLOUGHBY, in  
CHANCERY, before LORD HARDWICKE \*.

LINCOLN'S  
INN-HALL,  
Dec. 15, 1756.

*Mr. Attorney General†.*

**M**Y lord, here is an abstract produced by order. It was laid before counsel by the mortgagee before he lent his money; wherein the marriage settlement, and mrs. Willoughby's jointure, is stated; and the counsel tells him it will be subject to that.

*Abstract of the Deeds and Writings relating to the Title of HUMPHRY WILLOUGHBY, Esq. read.*

"27th MARCH 1716. An indenture between George Willoughby, son and heir of Charles Willoughby, of the first part; Thomas Coker, second part; and Wadham Windham, third part; whereby, in consideration of 2500*l.* paid to George Williams by Thomas Coker (being the same sum of money mentioned in an assignment bearing even date herewith, and made between the said George Willoughby of the one part, and Wadham Windham of the other part), the said George Willoughby demises and grants to the said Thomas Coker all that manor, &c. to hold to Thomas Coker, his executors, &c. for the term of 1000 years, at a peppercorn rent."

"13th AUG. 1718. An indenture between Thomas Coker, first part; Wadham Windham, second part; George Wil-

If a subsequent purchaser or mortgagee has notice of a former purchase or incumbrance, he shall not avail himself of an assignment of the old outstanding term prior to both in order to get a preference; but if he had no notice of such prior purchase or incumbrance, and has the first and best right to call for the legal estate, then, if he

\* This case has lately been cited as an authority in the court of King's Bench, but no entire report of the several parts of it has been before printed. A short account of it is now extant in Mr. Ambler's Reports, lately published; and Lord Hardwicke's argument in giving the decree is printed in 1. Term. Rep. p. 763, principally agreeing with the above; but the prior arguments are here first printed, and the entry of the Chancellor's decree is considerably more full than in either of the above-mentioned reports of the case.

† Mr. MURRAY,

loughby,

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gets an assignment of it, a court of equity will not deprive him of his advantage. If a second mortgagee lend his money upon an estate upon which there is an old outstanding term, and has notice at the same time of a certain incumbrance prior to his own, the prior incumbrancer has the best right to call for the legal estate, and to satisfy himself of any other incumbrances upon the estate, although such other incumbrances were not known to the second mortgagee at the time he advanced his money.

loughby, third part; and Shilling and Popham of the fourth part; reciting the last deed and George Willoughby's assignment to Windham. Now, in consideration of 2500*l.* paid to Thomas Coker by George Willoughby, and of 10*s.* by Shilling and Popham, Thomas Coker assigns to Shilling and Popham the manor of Watchstone, &c. to hold for the remainder of the term in trust for George Willoughby, and to attend the inheritance of the premises."

"23d and 24th March 1718. 'An indenture between Willoughby and wife, and Sir Germaine Raymond and Popham, reciting a lease from the Bishop of Salisbury, dated 10th Dec. 1715; and indentures of lease and release of the 21st and 22d of March, whereby George Willoughby, in consideration of the marriage and of 4000*l.* grants and conveys to Raymond and Popham the manor, &c.; and that it might happen that the premises charged, &c. might not be sufficient now for the considerations aforesaid, and for securing the payment of the annuity to Jane Willoughby, and for settling, &c. and in performance of the agreement, of the 13th Nov. 1717, George Willoughby grants and conveys to Raymond and Popham the manor of Watchstone, &c. to hold to them and their heirs, to the use of George Willoughby for life; remainder to Raymond and Popham, to prove it, &c. and after the decease of George Willoughby, to the issue that Jane might receive yearly an annuity, &c. with power to make a distress, &c. and after his decease charged, &c. to the first and other sons in tail male, &c."

*Lord Chancellor.*

THIS is clearly notice. It will raise another question: Whether the matter is not now all in equity? If it is all in equity, and the defendant cannot protect his legal estate against the equity of the marriage settlement; if he cannot

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do that, then the question will be, Whether, as the whole must be considered in equity, it is within the rule *qui prius est tempore, potius est jure*? That was a question I thought upon at first; but, for want of proof, would not enter into it.

IF it comes to this, the general question will be out of the case. It is a great pity but that general question was determined, for the sake of mankind.

I HAVE had a great deal of discourse with Mr. Filmer upon the subject, who is a candid and a fair man, and I cannot find out from him any certain rule they have gone by. He told me what was Mr. John Ward's opinion and way of practice; and that was, as Mr. Attorney says, that they did not *take their assignments*. Here is an assignment of a term, with notice of a trust.

*Mr. Attorney General.*

MY lord, there have been some cases looked into, but none like the present. Oxwich and Simpson: there were two mortgages; the first was to Simpson, the other to Moreton. Moreton's was assigned to attend the inheritance, and the plaintiff claims under that mortgage. Simpson's mortgage was prior; and defendants, by having taken in that, secure their purchase. It does not appear that Simpson's mortgage had ever been assigned to attend the inheritance.

*Lord Chancellor.*

I HAVE looked into my copy of lord Somers's notes, in the case of lady Radnor; I cannot find there that the term was assigned to attend the inheritance. There is a great deal of difference in the case of a trust. I believe it will be

be proper for Mr. Attorney to go on to shew the distinction; there does seem to me to be a considerable distinction.

*Mr. Attorney General.*

MY lord, it comes, in point of fact, to this: That this term was originally assigned to attend the inheritance, and consequently becomes subject to all the uses to which the inheritance was subject. It is assigned by the trustees to a new trustee, with express notice of those uses limited of the inheritance, prior to the mortgage taken by Mr. Crisp. The consequence is, that his trustee would not take it to protect, in the first place, his mortgage; but he took it subject to all the former uses which it was to protect; and a trustee who takes an assignment with notice of a former trust, is to all purposes a trustee just in the same situation as the former was. What is the consequence? That all the uses of the marriage-settlement, all the uses that had been derived out of the inheritance by the owner, must take place. Who have a right to call for the protection of this term? All persons having a right to the legal estate; that is here the jointress.

THE great point here is, when there are two equity securities and a legal estate, and the two equity cases contending, the question is, Who has a right to the protection from the legal estate?

In the case of lord Pomfret it was held, that where a legal estate was in a trustee, and the owner had a right in equity to call for the protection of the legal estate, he should have it. Who has it here? The jointress unquestionably. Who has that right next to her? The owners of the uses of the inheritance that are prior, in point of time, to the mortgage. The trust of attending the mortgage is plainly a bad one,

WHERE

WHERE there are two equities, then, supposing neither had a right, *qui prius est tempore, potius est jure*.

IN the case of Gibson, when none of them had any previous right to the legal estate, it was held that they must go according to their priority.

I MUST submit it to your lordship, that there is a difference between taking a term that is expressly assigned to attend the inheritance, and an assignment of a satisfied mortgage term, which might be made so by construction. It is in his own possession, and uses and trusts may result; but, when upon the face of it it is made to attend the inheritance, he must enquire, What are the uses it is to attend?

How is the assignment here? In trust to attend the inheritance. What is that inheritance? Just what estate he would have conveyed. Suppose Mr. Willoughby had made a conveyance without making an assignment in this manner of the term, how would it have operated? Subject to the term of years. He would only grant it subject to the former uses and charges; and this is with express notice of the settlement, which he has no way mentioned. Upon reading the assignment, his taking it appears to be a fraud. If he meant to lend his money subject to the jointure or charge, he should have recited it so; but, instead of that, he takes it to defeat the jointress, if he can.

*Lord Chancellor.*

IS there no exception of the jointure in the covenant against incumbrances?

*Mr. Attorney.*

NONE, my lord. It is a breach of trust; and this court will never suffer him to take advantage of that.

They



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They have blinked the truth in their answer by concealing it; and now at the bar they have urged to have it preferred to the jointress, in order to edge out her title.

It deserves well to be considered what inconveniencies would arise, if assignments are made to attend the inheritance, and you do not give notice of the trusts. What would be the consequence with regard to a marriage settlement? By playing that term into the hands of a mortgagee from whom the settlement is concealed, you might trip up the heels of many settlements; whereas, by express terms, he only takes it as a mode of conveyance, mere matter of form. It must be subject to all the uses to which the inheritance is limited; and whoever comes in under that term, comes in under the uses to which the inheritance is limited.

*Lord Chancellor.*

MR. Attorney, I thought you would have entered upon the particular point, How far he can protect? Here is notice; he certainly cannot protect against the jointress.

*Mr. Attorney General.*

MY lord, all the prior uses of the inheritance it is certainly subject to: then we shall have the direction of the court to protect this jointure. He cannot protect his security against the jointress: then the only question is, What uses of the inheritance are to take place next after this rent-charge? They can put in the legal estate as between the rent-charge and *mrs. Willoughby's mortgage*.

THERE he has no prior right to call for the protection of the legal estate, because the assignment is in breach of the trust.

HERE

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HERE is an application to the court for directions in what manner this is to attend the inheritance. We have the prior equity. It must be as the uses are created. Perhaps that comes within the nature of the uses which the term is to protect. He cannot divide it, he cannot split it. If he had recited the settlement and taken it, subject to the rent-charge of 300*l.* a year, he would have had a much better case of it, because he would have been supposed to have acted fairly. Here he has not. He has notice, and he has endeavoured to set up the term against the jointress with express notice.

*Mr. Serpell.*

YOUR lordship will please to favour me on this point, as between the mortgagees. I did perceive, by the answer, that the defendant had expressly denied notice of the mortgage, but took no notice of the settlement. The plaintiff only charges, that the defendant had notice of it when he lent his money. Now here is but barely sufficient to satisfy the plaintiff claiming under the settlement, and one of the mortgagees; therefore the question remains as between these two mortgagees.

I SHALL first submit it to your lordship upon the foot of our having an assignment of the term (without going into that matter at all), upon a supposition, in the first place, that we can make use of the term that we have in our trustee (except so far as we have notice); and I shall submit it to your lordship upon another circumstance; and that is, as to the conduct of Mrs. Willoughby in leaving her deeds in the hands of her son, which enabled him to go on and make a second mortgage. Then, upon a supposition that it was proper to take an assignment of the term, and that we would make use of it against those who claim under the settlement (provided we had no notice); now  
that

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that we have notice, it will only postpone us as to those of whose rights we had notice.

HERE is 300*l.* a year to the widow; then a term to raise younger children's portions, &c. Henry Willoughby, upon the death of his father (subject to the jointure, &c.), became entitled as tenant in tail; and he suffered a recovery, and limited the uses to the defendants Garrard and ——— and their heirs; the legal estate is now in them; it vested in them in trust and for such purposes as the defendant, Henry Willoughby, should appoint. 23d June 1751, Henry Willoughby makes the mortgage in question to his mother for 870*l.* in this manner: "By a deed dated the 23d of June 1751, he appoints the estate so vested in the Garrards, the trustees, for the benefit of his mother for the term of 500 years, redeemable upon payment of 870*l.* In a year afterwards (to wit), in June 1752, 15th and 16th, by lease and release, at the time that the defendant Crips lends Henry Willoughby 800*l.* he professes to make a legal conveyance to Crips, and at the same time he assigned the term in question to boot as his trustee, for the benefit of mt. Crips and his heirs, in trust to attend the inheritance, and for better securing the repayment of the mortgage-money. As to the first question, it is certainly true, that where a man takes a legal estate, with notice of a prior incumbrance (whether it is conveyed to himself or to a trustee), he shall certainly be postponed as to that of which he has notice; that is clear."

THE question then is, if there is something of which he has no notice, Whether he can protect himself against that of which he has no notice, postponing himself to that of which he has notice? "

CONSIDER the foundation of the first incumbrance.

First, we must suppose that the legal estate is in mr. Crips.

*Lord Chancellor.*

YOU presume too much; you must take it to be in the trustee; for it is a question which has the first and preferable right. If he had had the legal estate, he might have done it.

*Mr. Sewell.* •

MY lord, I mean his trustee that is subject to that opinion of its being a term expressly assigned to attend the inheritance. Suppose it a satisfied mortgage term, that comes to mr. Boot as a trustee for mr. Crips; then the question is, Whether the plaintiff has any equity against mr. Crips or mr. Boot, for any thing more than that security of which mr. Crips had notice?

THE foundation of all must be, that the defendant intended only to take the estate as it was, subject to the prior incumbrances; because the assignment of the term is affected with the trust of which he had notice; therefore there is a right in equity to secure that. There is so far a right to call for the protection of the legal estate in this manner: I shall not be considered as a trustee for you, so far as I have a prior right.

THE question is, How far she has a right in equity? The whole right is founded upon equity. That is the foundation upon which notice affects the defendant; therefore the equity on the one side cannot go farther than the equity on the other. Suppose two mortgages are made; and suppose that the first mortgagee had the legal estate in fee conveyed to him for the security (say) of 1000*l.* then the second mortgagee comes with notice of the first mortgage, and he lends a further sum of 1000*l.* he is postponed to the first mortgage, the legal estate of which is complete (but, indeed, in the present case, it is in the

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trustee, subject to your lordship's opinion). Suppose the first mortgagee goes on and lends more money (say) a further sum of 1000*l.* then there will be 2000*l.* due to the first mortgagee, and 1000*l.* due to the second mortgagee, who would come in between the first and the third mortgage. The question will be, Whether the first mortgagee shall have a satisfaction for both 1000*l.* prior to the second mortgage? What will be the consideration in that case? It will be simply this: Whether, when he lent the further sum of 1000*l.* he had notice that the second mortgage was executed? If he had no notice, he would by that means tack the third to the first; and the only reason for his doing that would be, that he had no notice that there was a further sum of 1000*l.* lent by the second mortgagee. But suppose that after he had lent the first 1000*l.* he had notice that a second mortgage was made, and notwithstanding, that the first mortgagee lends a further sum of 1000*l.* in that case he would be clearly postponed to the second mortgage as to the last 1000*l.* because he had notice before lending his money.

THIS would be the case even where the first mortgagee had the full and complete estate in him; much more will it be so now, when he comes into equity to have the assistance of the legal estate against mr. Crips and mr. Boot, in whom the legal estate is. Say they, We have the first incumbrance, and therefore we have a right to the benefit of the trust term. The question is, How far? We say, So far as we have notice you have a right; but so far as you lend money afterwards, you have no right. The consideration of which I have notice, I must be postponed to, but not to the further consideration.

SUPPOSE it had been recited in the mortgage to mr. Crips that there was this settlement, and that he took the term subject to this prior incumbrance: in this case, Would he not have a right to hold against every thing but what is recited? Certainly he would. And why? Because, in conscience,

conscience, he is only affected with that of which he has notice. Therefore, upon a supposition that the plaintiffs cannot have the benefit of the trust-term without coming into this court, they certainly can only have it *quoad* notice. It is the notice only that gives them the equity. That is all upon a supposition that they have such a right in equity, and it can only be so far as they have a priority. This is what occurs to me upon this part of the case.

THE other point is as to the manner of mrs. Willoughby's taking her mortgage, which is prior.

IN declaring the uses of the recovery, she, in fact, has no legal estate; and therefore, though the term was to attend all the legal estates, yet, in fact, she has no legal estate: the uses of the recovery are to the use of the Garrards and their heirs. They are now seised of the fee in failure of appointment by Henry Willoughby. The 500 years term for the plaintiff, his mother, is only an equitable term; it does not at all take the legal estate out of the persons in whom it is vested, by the declaration of uses of the recovery. If it had been to such uses as Henry Willoughby should appoint, that appointment would have vested a legal estate; but when the legal estate is vested in trustees, then the appointment is only an appointment in equity.

THERE is this further to be offered; this is dated in June 1751; she suffers the title-deeds to remain in the hands of the son twelve months, who makes a mortgage, and delivers over the title-deeds.

*Lord Chancellor.*

MR. Sewell, Is that made a point of in the cause? Every time this cause is spoke to, new points are started.

If you had intended to take advantage of a fraud in the first mortgagee, you must make a point of it, and examine to it; it depends upon particular circumstances.

THIS point has grown by time. By being so often mentioned, and further considered and attended to, it is become an important question: I therefore shall not determine it now; I will consider of it during the holidays, and tell you my opinion.

ONE thing strikes me with regard to the general principle laid down by serjeant Maynard in the duke of Norfolk's case: he lays it down in express terms, as a thing known, that whoever has a term, or creates a term, which is afterwards assigned to attend the inheritance, he being owner of the inheritance, may, if he pleases, sever the term from the inheritance. I do not doubt but that is true; still the question here comes to be this: Suppose a man has such an inheritance as this, and the equity of the term (only a partial interest in the inheritance, with particular estates divided off from it), as that the mother is tenant for life of the estate itself; can he, being owner of the inheritance, subject to particular estates divided out of it, and without notice of those particular estates, make a good mortgage, and direct the trustees of the term assigned to attend the inheritance to assign to the mortgagee, and will that be effectual? As the trust was to attend the inheritance, it must attend the freehold, and the particular estates derived out of it. It is going a great way when I lay it down as a principle and say, that an interest assigned shall always go along with the inheritance; that a fine and recovery will carry along the equity of the term. Notwithstanding a term cannot have a recovery suffered upon it, still this carries with it a particular term attendant upon the inheritance; so that the new uses shall mould, and vary the trust of the term. When it is so, ought this court to suffer a partial owner of the inheritance, subject to particular estates, to sever that from the inheritance? It would be going a great way to do that.

THE next thing here is, Whether it does not come to that? Though the mother has only a rent-charge, yet it  
is

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is a charge upon the freehold and inheritance, and consequently it is as much to be protected by the term as the particular estates.

It is going a great way to say, where a man has the fee, subject to particular estates, he can separate such a term from the inheritance, notwithstanding the entire owner of the inheritance may do it.

*Mr. Attorney General.*

MY lord, he may make it either real or personal estate.

*Lord Chancellor.*

LET it stand at the head of the paper the last day of exceptions before next term.

*Lord Chancellor.*

THIS cause comes before the court upon a bill brought by the plaintiffs to have a satisfaction for several incumbrances out of a real estate, and to have a sale of the estate for these purposes; and the only dispute between the parties in the cause is, as to the priority and preference, in the opinion and judgment of this court, between two particular incumbrances, two mortgages: the first of which, and prior in point of time, is claimed by the plaintiff, the widow; and the other of which is posterior in point of time, but still claimed to have a preference, and is in the defendant Crips.

THE case upon which it arises is this: George Willoughby, the plaintiff Jane's husband, was seized in fee of the estate in question, subject to a mortgage for a term of years; and the 12th of Nov. 1717, in consideration of, and previous to his marriage with the plaintiff Jane, he

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enters into articles to settle the estate in this manner: first, to himself for life; and in the next place to secure a jointure of 350*l.* *per annum* to the plaintiff Jane, with remainder of the whole of this estate to the first and other sons of the marriage in tail male; with remainder over to George Willoughby in fee. There was a power reserved to George Willoughby, by the father, to charge the premises either by any deed executed in his life-time, or by his last will, with 3000*l.* for younger children's portions, which portions are part of the demands of the plaintiffs in this cause.

ON the 24th of March 1718, a settlement was made in pursuance of these marriage articles; and the 17th of August 1718, which was prior to the making and executing that settlement, an old mortgage term (to which the estate was subject at the time of the entering into the articles); that term was assigned over to two trustees, Shilling and Popham, upon an express trust declared; which was in trust for George Willoughby, his heirs and assigns, to attend and wait upon the freehold and inheritance of the premises, and to be subservient thereto.

THIS you see was an assignment made the 17th of Aug. 1718. The marriage settlement executed in pursuance of the articles, was on the 24th of March following.

ON the 24th of March 1750, George Willoughby, the father, made his will, and by that he executed his power by charging the estate with the sum of 3000*l.* for younger children's portions; and afterwards the testator died, leaving the plaintiff Jane his widow, Henry his eldest son, and three daughters, who are co-plaintiffs, and a younger son George.

THE plaintiff, Jane Willoughby, is intitled, under the marriage settlement, to a jointure of 350*l.* a year. The defendant, Henry Willoughby, he was tenant in tail under the marriage settlement; and, after the death of his father, Henry suffered a common recovery, and barred the entail;

and

and he declared the uses of that recovery to be to trustees and their heirs; upon trust nevertheless, and to the use of such person and persons, for such estate and estates as he the said Henry Willoughby should by deed appoint.

AFTER he had suffered this recovery, he borrows the principal sum of 870*l.* of his mother, and by an appointment in pursuance of the deed declaring the uses of the recovery, he limits the estate to her for a term of 500 years; but all this time the old term remained in the trustees, Shilling and Popham, to whom it was assigned in 1718.

On the 15th of June 1752 (which was in point of time about two years, or a year and nine months, after making the first mortgage), the defendant, Henry, borrowed 800*l.* of the defendant Crips; and for securing the repayment thereof, made a mortgage of the inheritance to, the defendant Crips in fee; and by deed Shilling, the surviving trustee in the old term, by the direction of this defendant Henry Willoughby, assigned that term to the defendant Alexander Boot, to protect Crips's mortgage of the fee-simple.

IT appears in evidence in the cause, that previous to the taking the mortgage, and expressly upon that occasion, Crips had full notice of the articles on the marriage; and notwithstanding that, there is a covenant from the defendant Henry in the mortgage-deed, that the premisses are free from all incumbrances, except an indenture of assignment of the old term to Boot, which is the same day, and besides the term and the incumbrances thereof; but it does not appear that the defendant Crips had any notice at all of the mortgage made by the defendant Henry Willoughby to the plaintiff his mother. The plaintiff Jane, the mother, together with the younger son, bring their bill to have the benefit of her jointure for a sale of the estate subject to the jointure of 350*l.* a year, and out of the money arising by sale to be paid the arrears of that jointure; and in the next place to raise the provision for

the younger son and daughters, and then to be paid her mortgage of 870*l*. and the other incumbrances in their order.

THE defendant Crips, who is the puiſne mortgagee, now ſubmits, that the jointure and the proviſion for the daughters and younger ſon be preferred to him; but inſiſts that his mortgage ſhall be preferred in payment to the plaintiff Jane's mortgage; becauſe the legal eſtate of the prior term is veſted in the defendant Boot, who is his trustee, and he is a purchaſer of it without notice of the firſt mortgage. What he founds himſelf upon is this principle, that the legal eſtate in the term being veſted in a trustee for him, he has both law and equity on his ſide; and the defendant Jane has only equity aſ. againſt the term,

Two queſtions have been argued at the bar. The firſt is a general queſtion, and of great conſequence: Whether this old term, which was veſted in Shilling and Popham, having been aſſigned to Shilling and Popham upon an expreſs truſt declared (to attend upon the freehold and inheritance), the defendant Crips would in equity have the benefit of it to proteſt his mortgage both againſt the jointure, the younger children's portions, and the prior mortgage; even ſuppoſing he had no notice whether he would have the benefit of the term to proteſt that mortgage as againſt them?

THE ſecond queſtion is a particular queſtion: Whether the defendant Crips, having full notice of the marriage ſettlement, and the jointure and the portions, and conſequently not being intitled to the entire abſolute benefit of the legal eſtate of the old term, can be preferred to the plaintiff mrs. Willoughby, even as to her mortgage? or, Whether he muſt not come in, as to his mortgage only, according to priority, or as it is in order of time? Theſe are the two general queſtions. And as to the firſt, as I ſtated it, it is this: Whether this term having been aſſigned to Shilling and Popham upon an expreſs truſt de-  
clared

clared to attend the inheritance, the defendant Crips would in equity have the benefit of that term to protect his mortgage, both against the jointure, the portions, and the prior mortgage, supposing he had no notice?

THAT depends upon three considerations.

FIRST, the nature of a term assigned to attend the inheritance. Secondly, What kind of grantee, or owner of the inheritance, is intitled to the protection of such a term? or, in other words, in whose hands such term should be allowed to protect the inheritance? The third is, Against what estate, charge, or incumbrance the protection arising from such a term assigned to attend the inheritance shall extend?

THESE are the three considerations upon which the first question depends.

FIRST, What is the nature of a term attendant upon the inheritance?

THE attendancy of a term for years upon the inheritance is the creature of a court of equity, invented partly to protect real property, and partly to keep it in a right channel. There are two ends answered by it; partly to protect real estates, and partly to keep them in a right channel.

IN order to this, they have framed distinctions between such an attendant term, and a term in gross. The courts of common law can keep out the owner of the fee-simple so long as the term subsists; but as equity always considers who has the right in conscience to hold, and upon that ground ~~should be made one party~~ to be a trustee for another; and as the common law allows the possession of tenant for years to be the possession of the owner of the freehold; so this court, where the tenant for years is but a trustee for the owner of the inheritance, will not keep out the *cestui que* trust, nor, *pari ratione*, obstruct him in any act of ownership, or in subjecting the estate to any incumbrance; and therefore such a term would go according to the uses

or

or appointments which the owner of the inheritance shall carve out; and thus the dominion of real property is kept intire.

OF these cases I meet with none in the books before queen Elizabeth's time, when mortgages for a long term of years began.

THE first is the duke of Norfolk's case. Before that time the law looked upon a long term of years with a jealous eye, and laid them under violent presumptions of fraud, because they tended to deprive the crown of forfeitures, and the lord of his perquisites of his tennures; neither would there be any falsifying by a termor. But the tenant for years was in the power of the owner of the freehold till the 21st Hen. 8. which enabled them to falsify a recovery. Before that, the term was gone by the recovery; but since the alteration of the law by that statute, and the term being by the statute preserved, this court would lay hold of it; and they proceed upon this principle:

WHEREVER a term is vested in a stranger, in trust for the owner of the inheritance, and which, by any trust expressly declared, is attendant upon the inheritance, or where it is so by the opinion and judgment of this court (that is, a trust, by operation of law), this court has said, that the trust or beneficial interest of the term being affected by all such charges as the owner creates touching the inheritance (though the law says that the term for years and the fee-simple being in different persons, they are separate and distinct, and the one not merged in the other), yet the beneficial interest in both being in the same person, equity will unite them for the sake of keeping the property entire; therefore if the owner of the inheritance levies a fine *jur. censans de droit*, or suffers a recovery, the use of the term follows that, though a term is not the proper subject of a fine or recovery.

THIS

THIS doctrine is always allowed to have its full force, as between the heirs in fee simple and in fee tail, owners of the inheritance, and all claiming under them as volunteers (though certain distinctions have been mentioned which are not material now); and in general the rule is the same, whether the trust of the term be created by express declaration, or arise by the construction and judgment of this court.

UPON this ground is the case of Tiffin and Tiffin, 2. Cha. Ca. 49. 55. i. Vernon. 1. Best and Stamford 2. Vern. 520. Precedents in Chancery 252. Hayter and Rod, 1 Williams 360. Whitchurch and Whitchurch, before the Lords Commissioners, 2. Williams 236. Lord and Lady Dudley, Precedents in Chancery, 241. 2d. Cha. Ca. 160. upon the custom of the city of London.

ALL these cases were cited at the bar; I chuse to put them together without stating them, because they all tend to prove this general proposition, That as between the representatives of the owners of the inheritance, or any person claiming voluntarily under them, this doctrine relating to the term's following the inheritance does take place; in all these cases the court considers the trust as annexed to the inheritance, though the legal interest is separated (else it would be merged). This gives the court an opportunity to make use of the term as a guard for the owner of the inheritance against mesne conveyances (which would carry the fee at common law), and decrees it to the person who was owner of the legal and equitable inheritance against such incumbrances as he ought not to be affected with in conscience. And in order to do this, this court often disannexes the trust of the term from the strict legal fee; but still it is in support of right, and that which is *bonâ fide*.

THIS brings me to the second consideration; What kind of grantee, or owner of the inheritance, is intitled in this court to the protection of the term assigned? or, in other

other words, In whose hands such term shall be allowed to protect the inheritance?

In the first place, a person who shall claim the benefit of such a term to protect his inheritance, must be a purchaser for a price paid, or for a valuable consideration; he must be a purchaser *bonâ fide*, not affected with fraud or collusion, and a purchaser without notice of the prior incumbrance, charge or conveyance; for notice makes him fraudulent. And here I do take in all persons claiming under marriage-settlements; they are purchasers.

If such purchaser has no notice of the incumbrance, and happens to take a defective conveyance of the inheritance (defective either by reason of a prior conveyance, charge or incumbrance, or otherwise), and also takes an assignment of a term to a trustee in trust for himself, or has the term assigned to himself and the inheritance to a trustee, in both these cases he shall have the benefit of the term to protect him; that is, he may make use of the legal estate of the term to defend his possession; or, if he has lost the possession, he may make use of it to recover that possession at common law, notwithstanding his adversary has at law the strict title: That made me say, that the court often disannexes the trust of the term from the fee, and still they do it in support of right. If a man that has paid a fair price for his land has acquired an estate which the law will support, if he has got a plan by which he can at law secure himself, there is no ground in equity or conscience to take it from him.

THIS is the meaning of the rule, That where a man has both law and equity on his side, he shall not be hurt in a court of equity.

It was once doubted, when a term was vested in a third person, who should be allowed the benefit of it in equity, for whom the stranger should be a trustee. The rule is, *Qui prior est temporis potius est jure*.

LORD

LORD COWPER lays it down to be a rule, that where a man is a purchaser for a valuable consideration without notice, he shall not be annoyed in this court; not only where he has the prior legal estate, but where, he has a better right to call for the legal estate than his adversary, and therefore dismissed his bill. 2. Vern. 599.

HERE I must observe, that he must have a better right to call for an assignment of the legal estate; and I do it for the sake of the use I shall make of it by and by.

THE third consideration is, Against what estates, charges or incumbrances, the protection arising from such attendant term shall extend? The answer to this question may be laid down very general against all estates, charges and incumbrances, created or introduced between the raising of the term and the purchase.

BUT here I desire it may be understood, that I take in all the qualifications or requisites before laid down: that there should be a valuable consideration; that he should be *bonâ fide*; and that there should be an entire fairness in the purchase, unaffected by notice express or implied, and having the first and best right to call for the legal estate of the term.

- ALL these must concur to warrant this protection, otherwise he cannot have it.

HERE several distinctions were attempted.

1st, THAT this will be so where the old term is standing out in the original mortgagee or grantee of it, or his representatives, and never assigned upon an express trust to attend the inheritance; but that where it is assigned upon an express trust, there it will attend the first limitation of the inheritance and all estates arising out of it; as here, the uses of the marriage-settlement; and the subsequent purchaser, without notice, gains no benefit from it.

2d. WHERE it is so assigned to attend the inheritance, it becomes so annexed that it cannot be severed from it.

THAT



THAT where it so remains in the original mortgagee never assigned, there no purchaser or mortgagee taking an assignment can gain a benefit by it; but where it is so assigned, it shall not be severed from it.

THIS was an attempt to establish a distinction between an express declared trust, and a trust arising by construction, or the judgment of a court of equity.

THERE was no authority or precedent cited to warrant this distinction; the only case wherein any thing of that nature appears, is to the contrary, in Equity Cases Abridged, 355, Oxwell and Brockett. How authentic that is, I cannot say: I do not find it reported in any other book, and the decree is not entered in the Register's book: the minutes are so imperfect, that nothing material can be collected from them, except that there was a mortgage term assigned to attend the inheritance.

IN the first place it was urged, that where a term is expressly assigned to attend the inheritance, that is notice to a purchaser that there are those limitations of the inheritance to be protected by it; and if so, the purchaser takes the assignment with notice of the limitations.

I TAKE this to be a mistake; such an assignment to attend the inheritance is notice of nothing but that there is an inheritance to be protected and attending it; but it by no means implies that the inheritance is bound by special limitations; for a satisfied term is often assigned to attend the inheritance in fee simple as well as in fee tail, and estates carved out by particular uses and limitations: such assignment, therefore, gives notice to a purchaser of nothing but what he had notice of by having the deeds relating to the fee; and in these cases it is the same, whether the trust is express or implied.

INDEED, if the trust is to attend the inheritance as limited and appointed by such a deed, or to protect the uses of such a settlement (and I have seen a great many instances of such deeds and marriage settlements), in that case it  
certainly

certainly will be notice of the deed or settlement, and consequently of all the uses in it, and a purchaser would be bound to find them out at his peril.

I LOOK upon this to have been the ground of the general application of this doctrine.

2dly, It was argued, that a term assigned to attend the inheritance is so connected with the inheritance, that it will go along with all the estates for valuable consideration: that wherever a new conveyance is made, the trust of the term will immediately follow, and the trustee will be a trustee for the new uses: that so it was upon the mortgage made to the plaintiff Mrs. Willoughby, by the defendant her son, and the term being in Shilling could not alter that.

I AGREE that it will be so against the grantor in the conveyance and his heirs, and all claiming under him as volunteers; so where the owner creates new uses or incumbrances, or new charges, as judgments or statutes staple, the trust of an attendant term is affected with it in like manner as the inheritance against the grantor and his heirs, and a purchaser or incumbrancer shall have the benefit of it: but wherever a purchaser comes in without notice, with the qualifications I have mentioned, and gets an assignment, he comes in in a different degree. As he has not only paid the value for the land, but got the law on his side, how can a court of equity take it from him, without contradicting all their rules? Thus a subsequent purchaser, having no notice, will stand against the first, as in the common case.

THERE is a third objection: That this is severing the trust of the inheritance from the term, leaving the title of the inheritance to go one way, and the trust of the term another way; and that it is not in the power of the owner of the inheritance, after the first conveyance, nor of the trustee, to sever them. In answer to this objection, it is not necessary here to enter into a discussion of all the cases determined

determined where it has been held that a term once attendant upon the inheritance may be disannexed again, and turned into a term in gross; it certainly may be done at any time by the owner of the inheritance; and it was so admitted by serjeant Maynard, in his argument in the duke of Norfolk's case. It may be made to become a term in gross upon a contingency, as often as it so happens.

HERE is no severance in this case. Crips claims the term as attendant upon the inheritance in him."

IN this court, had he come in without notice, he would have been considered as a purchaser *quoad* the mortgage. Though he took a defective title to the inheritance of the land, yet it is what he fairly bought, and he may protect it.

IF the argument was to prevail, it would prevent every mortgagee or purchaser who has an assignment of an attendant term, from making use of it to protect his title.

THIS argument was enforced by saying, that it would be putting it in the power of the trustee to prefer which purchaser he pleases, by assigning the term over; and that he can no more do it than a trustee appointed to preserve contingent remainders can assent to the destruction of them.

THESE are both alike; and I take this to be upon the same footing as a trust to preserve contingent remainders. If such a trustee had joined in a conveyance to a purchaser for a valuable consideration, and the purchaser has either express or implied notice of that trust, the purchaser is affected with the trust to preserve contingent estates, and shall be decreed to reconvey the estate to the old uses; it was so agreed in the case of *Manfell and Manfell*. But if the purchaser comes in *bonâ fide*, and has no notice of the trust, he shall retain the estate, and then the trustee must make satisfaction for his breach of trust.

JUST

JUST the same reason holds if a puiſne purchaſer has notice of the term assigned, &c. he can never avail himſelf of an assignment of the term, but the court will decree it to be reconveyed. If he had no notice, the purchaſer or mortgagee muſt retain the eſtate; but if the trustee, who joined in the assignment, had notice of ſuch a term assigned, &c. the purchaſer or mortgagee is in conſcience affected by the truſt. It was a breach of truſt in him, and he ought to be decreed to make ſatisfaction; and this is what equity would demand.

BUT to go a ſtep farther, and ſee to what extent this doctrine goes. It would make an assignment of a term to a purchaſer's trustee of his own naming in effect to protect him againſt nothing.

THERE are, from the attendancy of the term on the fee, incumbrances made, or charges created, upon the inheritance for valuable conſideration that immediately draws after it every charge of the truſt term. If therefore a purchaſer takes it ſtill bound by that derivative truſt, a purchaſer can never be ſafe: whether he has notice or not is nothing to the purpoſe; by this doctrine the eſtate is totally open to all prior incumbrances in the one caſe, as well as the other.

IT was ſaid to be a general rule for conveyances upon purchaſes or ſettlements, where they found an old term assigned upon an expreſs truſt to attend the inheritance, not to diſturb it, or take an assignment to a new trustee, but rely upon it as it ſtood.

I HAVE enquired of a very learned and eminent conveyancer, and cannot find there has been any ſuch general rule; if there had, I cannot think it would have been material, as this caſe is circumſtanced.

Is it true, that Mr. Ward is known to have declared it to be his opinion, and that he took it to be ſo. Now if he practiſed in that manner does not appear. If he did ſo, it would not make a general rule. In reducing the practice

to reason, it must be taken with distinctions. Where an old term is assigned upon an express trust to attend and wait upon the inheritance, as settled by such a deed, or to the uses contained in such a settlement described, or referred to particularly, and the conveyancer employed is satisfied that the uses were never barred till the purchase deed; he may safely rely upon it, because the assignment carries with it notice of the old uses; and so his title is clear.

AND where the assignment is generally to attend the inheritance, he may, perhaps, rely on the old trustee safely, especially in the case of a purchase or mortgage, where the title-deeds are always taken along with the new deed; for if he has the creation or assignment of the term in his own hands, no use can be made of it against him.

SUCH instances as these account for the practice, but cannot constitute a general rule.

MUCH has been said at the bar of the danger and inconvenience to settlements by this means; but the inconveniences arising on the other hand break in upon the rule of equity.

THAT a purchaser for a valuable consideration shall not be hurt in equity, or have his security at law taken from him, put them in the balance against these arguments, and they will be found much to outweigh them.

THESE rules in equity are analogous to several rules of the common law—of collateral warranty, non-claim, discent which take away entries; which rules are only contrivances to quiet possessions in people.

FOR these reasons I am clearly of opinion, upon the first point, that the defendant Crips, the mortgagee, would have been intitled to the protection of the term, both against the mortgage and the other charges, in case he had no notice of the settlement.

I SHALL seem to want an excuse for dwelling so long upon this part of the argument, as the decree will not turn  
upon

upon this point. But this matter has been so much labour-  
ed at the bar, and appeared to me to be of so much conse-  
quence to titles, that I thought it necessary my opinion  
should be known, that the court might not be understood,  
by their silence, to countenance these distinctions.

THE second point is a particular point, and arises upon  
the circumstances of this case.

THE second question is, Whether mr. Crips, having  
notice of the settlement, but not of the mortgage, to mrs.  
Willoughby, is not entitled to have the benefit of the old  
term; whether he can be preferred to mrs. Willoughby,  
even in respect to her mortgage; or, whether he must  
come in according to priority?

I AM of opinion, that the defendant Crips must come in  
only according to his priority in order of time.

My reasons are two. In the first place, he has not the  
legal estate in the term in himself; nor has he; as this case  
is circumstanced, the best or most preferable right to call  
for that estate.

In the second place, I cannot say that he took his  
mortgage clearly and *bonâ fide* in this case.

CONSIDER how the right would have stood as between  
the plaintiff and the defendant Crips, in case there had been  
no new assignment of the term, but the legal estate had  
remained in Shilling, the surviving trustee in the first  
assignment.

In that case it is most plain, that mrs. Willoughby's  
mortgage would have been preferred; for whenever the  
legal estate stands out either in a prior incumbrancer, or in  
a trustee, as against whom a purchase incumbrancer has not  
the best right to call for the protection of it, the whole is  
in equity; and then, *qui prior est in tempore potior in jure*.  
And this last point is expressly determined by sir Joseph  
Jekyll, in *Brace and duchess of Marlborough, v. Williams*,  
491.

IN that case it appeared, that a puisne incumbrancer bought in a prior mortgage, in order to unite that mortgage and his own, and gain a preference of an intervening mortgage. But it appearing, that there was a mortgage prior to that which he took in, the Court clearly held, that the puisne incumbrancer, where he had not the legal estate, would there have no advantage of this mortgage. But where the legal estate is standing out, the incumbrancers must be paid according to the priority of their mortgages.

THIS is the case where the legal estate is standing out ; but it must be understood subject to lord Cowper's qualification, so standing out that the puisne incumbrancer has not the better or more preferable right to call for the legal estate.

THAT mr. Crips has not here ; for he having full notice of the marriage settlement before he took his mortgage, the plaintiff mrs. Willoughby has the preferable right, even as against the defendant Boot, to call for the legal estate in the term to protect her jointure ; she may call for it to be assigned to a new trustee in trust for herself. This brings the whole into equity, and subjects the case to that general rule, *qui prior est in tempore potior in jure*.

SHE might compel the defendant Crips to redeem her in respect of the arrears of her jointure incurred, and then he must redeem her entirely ; and this is by no means so strong an extension of equity as the tacking a third mortgage to a first mortgage in order to squeeze out a second, because it goes only to the preservation of the plaintiff's clear priority, which she had acquired by having the first mortgage.

IN the second place, I think this point is materially corroborated against the defendant. In that the defendant did not take his mortgage *bonâ fide*, it appears to me, that he aimed at gaining an unfair advantage against mrs. Willoughby. He had full notice of her settlement ; he knew well these to be incumbrances upon the estate ; and yet in contradiction ,

contradiction to this, and with his eyes open, he takes an express covenant in his mortgage deed, that the premises were free from all incumbrances except the assignment of the old term to Boot, and the mesne assignments thereof.

THIS is plain, that he intended to conceal that full notice he had of the marriage settlement; and in consequence of that he has not admitted that he had notice of that settlement by his answer, but puts the plaintiff upon proof of it; and now it comes out, that it appears to have been fully stated, in a case that was laid before his own counsel, previous to the lending the money.

THIS was against conscience; and it was a bad and an indirect intention against mrs. Willoughby's securities.

FOR these reasons, I am of opinion, that the defendant Crips wants and stands divested of two ingredients necessary to intitle himself in equity to the protection of the old term against the plaintiff mrs. Willoughby. He is not clearly a *bonâ fide* purchaser, nor has he the first and best right to call for the legal estate. Therefore he can come in only according to the order of time, which is posterior to the jointure, the portions, and the plaintiff mrs. Willoughby's mortgage.

#### MINUTES OF THE DECREE.

LET it be referred to the master to take an account of what is due to the plaintiff mrs. Willoughby for the arrears of her jointure of 350l. a-year, pursuant to her marriage-articles and settlement; and let the master likewise take an account of what is due to the plaintiff George Willoughby, the younger son; and the plaintiffs the daughters, for principal and interest of their respective portions, charged upon the premises in question, by virtue of the said marriage-settlement and their father's will; and let the master likewise take an account of what is due for principal and interest upon the mortgage to the plaintiff Jane Willoughby, and upon the mortgage to the defendant Jeffry Crips, and



tax both of them their costs in respect of their mortgages ; and let the whole estate be sold (subject to the jointure of the defendant Jane, unless she accepts an equivalent in lieu thereof ; and if she does accept such equivalent, then let the master set a value upon it, and let that be paid in the first place out of the monies arising by the sale) to the best purchaser or purchasers that can be got for the same, with the approbation of the master, and all parties are to join and indorse deeds, &c. ; and let the master take an account of the rents and profits of the estate in question, which have accrued since the death of Mr. Willoughby, received by the plaintiff Willoughby the widow, or any other person by her order or for her use ; and let that be applied, in the first place, to keep down the arrears of her jointure, and, in the next place, to keep down the interest upon her incumbrance ; and the money arising by sale of the real estate is to be applied, in the first place, in payment of what shall remain due to the plaintiff Jane Willoughby for the arrears of her jointure, and, in the next place, in payment of what shall be found due to the plaintiff George Willoughby, and the defendant Martha Willoughby, and the defendants Anthony Pyc and Elizabeth his wife, and Thomas Young and Jane his wife, for the portions of the said plaintiff George, and of the said Elizabeth, Jane, and Martha, and, in the next place, in payment of what shall remain due to the plaintiff Jane, the widow, upon her mortgage, for principal, interest, and costs, and, in the last place, in payment of what shall be found due to the defendant Clips upon his mortgage ; and if there be any surplus of the money arising by such sale, let that be paid to the defendant Henry Willoughby ; let all parties produce all books, &c. and be examined upon interrogatories before the master ; and let all parties have their costs to this time (except such costs as have already been given) out of the estate ; and reserve the consideration of subsequent costs, and all further directions, till after the master has made his report.

## No. XIV.

READING ON THE LAW OF USES, by SERJEANT  
CARTHEW, at the NEW INN, in MICHAELMAS  
TERM, the THIRD of WILLIAM and MARY, when  
he was DEPUTY READER for the MIDDLE TEMPLE.

(From the MS. of a late eminent BARRISTER.)

## THE CASE.

**A.** SEISED in fee, conveys land to the use, &c. cove-  
nants to stand seised to the use of *E.* then wife to  
*J. S.* for her life, and after her death to the use of *B.* his  
son, in fee. *J. S.* the husband, refuses to accept the use  
limited for his wife. Afterwards there is a general sen-  
tence of divorce between the said husband and wife, and  
she takes another husband, viz. *J. N.* and he enters into  
the land in right of his wife; and afterwards the sentence  
of divorce is repealed. Then enters *J. S.* the first hus-  
band, and *A.* enters upon him, and *J. S.* brings an assise.

**POINTS.** 1. IF the husband's refusal to accept the use  
did extinguish, or only suspend, the right of  
the wife?

2. SUPPOSING the refusal did only suspend  
the right of his wife, then if *J. S.* the first  
husband (after the sentence of divorce re-  
pealed) in right enters, notwithstanding  
his first refusal?

It may not be impertinent, nor unprofitable, if I pre-  
mise somewhat touching the nature of a conveyance in ge-  
neral, and distinguish between the quality of several sorts  
of them, and particularly of that by way of covenant to  
stand seised, and shew the difference of their several opera-  
tions in law; as also what alterations the statutes have  
made on the common law in this matter.

THE nature of a conveyance is this: It is an instrument ordained by the law whereby to transfer one man's right to another according to the tenor of the contract between them, and remains an evidence of the contract to posterity.

AND of these there are several sorts, whose operations are different, but all agree in the same end, viz. in conveying a right or property from the vender to the purchaser.

**Feoffment.**

THE most worthy at common law is a feoffment; which, for its public execution by livery and seisin upon the land, had ever the best esteem at common law, because the matter of the conveyance was of itself a general notice of the change of ownership, whereby many inconveniencies, touching the tenancy of the freehold, in real actions, were prevented.

This sort of conveyance has two distinct operations.

AND this diversity accrues with respect to the consideration; for on a feoffment without consideration, the feoffee at common law, after the statute of *Quia Emptores*, Dyer 146. b. had the estate in law, but the feoffor the use and equity to all the profits, as a resulting trust. By 27. Hen. 3. c. 8. the possession is transferred to the resulting use, so that now such feoffee takes nothing; for the whole estate in the land, the same instant it passeth to such feoffee, results from him back to the feoffor, for want of a consideration meritorious in law. But by a feoffment on good consideration, the legal estate, with use, passes entirely to the feoffee, and nothing results back again; whereby you see the diversity in operation, and its occasion.

**Lease and release.**

THE next specific conveyance I shall take notice of is, a lease and release; of which there are two sorts;—one, properly; the other, improperly.

THAT properly so called is a conveyance at common law; nothing passeth by this release, unless the lessor is in

in actual possession of the lands at the time of making the release, because it wants matter to enure upon; therefore a release of right to a person who hath but an *interesse termini*, is void.

THE lease and release, improperly so called, is that which is generally made use of at this day, and is a compound conveyance, made up part by the common law, and part by statute 27. Hen. 8. which gave birth to this sort of conveyance; for that, before that statute, there was no such conveyance in the manner it is now made use of; for now upon release to a person who at that time hath no other estate in the land but only by operation of law, and that which is now called the lease, is no other but a bargain and sale of the lands for a term; and this must be expressed to be made for a consideration of money, or no use will arise to the bargainee; and if no use ariseth, no possession ariseth, or is transferred by the statute of uses, and consequently the release is void; but if there be consideration money, that raiseth a use to the bargainee during the term, and the statute executes the possession during the term to the use: and by this operation of the statute, the bargainee has such a possession of his term, that he is capable to accept a release, which, by the common law, he was not.

ANOTHER sort of conveyance is a bargain and sale, Bargain and sale. which is a complete conveyance of itself, sufficient to pass the greatest estate without a release or any other deed; but the consideration must be money, and no other consideration will raise a use by this sort of conveyance.

THERE is a difference between a bargain and sale of a term, and a freehold, as to the circumstances requisite to the execution of the use; for the use of the term is raised and executed in the bargainee upon delivery of the deed: but in the last, the use of the freehold is not executed in the bargainee till after inrollment of the deed of bargain and sale; and this must be done within six months after the delivery.

delivery of it, or all is void; and this is restrained by 21. Hen. 8. c. 16. But a bargain and sale of a term only is adjudged out of the meaning of the statute, therefore adjudged not to be inrolled.

A BARGAIN and sale was at common law, but then the operation of it was thus: It being for the consideration of money, a use did arise by force of that consideration to the bargainee, and he had the equity for the profits; but the legal estate remained still in the bargainor; so there was at common law this diversity in its operation of a bargain and sale with consideration, and a feoffment without consideration: in the first case the use passeth, but the estate remaineth behind; but in the last the estate passeth and use remained; but now, by the statute of uses, they are executed in both cases, and the legal estate thereby annexed to the use.

Covenant to  
stand seised.

THERE is another sort of conveyance, that is, by way of covenant to stand seised, whereon our present question ariseth; and this I take to be the most critical conveyance of all, and not adviseable to be made use of except very well understood.

1st. OBSERVE, that this is no common law conveyance, for its operations depend on the statute of uses.

2d. THERE is but one consideration in the law which is proper and effectual in this sort of conveyance, and this is the consideration of blood; and in a bargain and sale none but money; and if either of these considerations are misapplied, the whole conveyance is void. And in a conveyance by way of covenant to stand seised, no use will arise to any man unless he is privy to the consideration, though he be a party to the deed; for if he be a stranger to the blood of the covenantor, he is not within the consideration, though he be a party to the deed, and the consideration must raise the use; then the consideration failing, the use must fail: therefore, in Dyer 374. b. the consideration, being his bastard son, was held insufficient; nay,

in

in Yelv. 51. the consideration of his son's marriage was held insufficient to raise a use in her, who was to be the son's wife, because she was at that time a stranger to the blood of the covenantor, forasmuch as she is one with the blood of her husband; and this I take to be the better opinion.

HENCE observe, that from this conveyance no remainder can be limited to a stranger in blood, as in other conveyances; for this is a peculiar conveyance, and may properly be termed a family conveyance, for it is only needful among relations.

THESE things being laid down, we may now better consider the difficulties of them in our present case.

HERE the father covenants to stand seised to the use of his daughter for life, and after her death to his son in fee; and it has been adjudged, that the very naming the party daughter or son, implies a consideration of blood sufficient to raise uses pursuant to the deed. *Mo. 175, 176. Croffing and Scudamore.*

THEN the consideration in our case is sufficient; so that a use is raised by the deed, and executed to the daughter by the statute of uses; so that she was, by operation of law, immediately completely seised, and her husband in her right, till he dissented. The consequence is, that by his refusal to accept the estate and use, they were again divested from the husband and wife; for the husband has the absolute command of all the wife's estate during coverture; and that being in his power, it cannot be that any man should be forced to take an estate against his will.

BUT the difficulty is, Whether the divesting shall work an extinguishment of the uses, or only a suspension during coverture?

As to this, it seems a hardship that the husband should have such a power absolutely to defeat the freehold of the wife. To be sure, he has no such power directly over any estate of freehold which was vested in the wife at the time of her intermarriage; for if he alien such during coverture,

the wife, after his death, at common law, has her action *cui in vitâ*, and her heirs *ne cui in vitâ*; but now, by the statute 28. Hen. 8. c. 32. she and her heirs may enter and defeat the husband's alienation. But our case is an estate not vested in the wife at the time of her intermarriage, but the feme is *sub potestate viri* at and before the limitation of the use; so not like the other case, where the estate and wife come together; for there the estate being vested, and once absolutely in the power of the wife, the law takes care to preserve that right of freehold to the wife after the death of her husband, in the same plight as was before her intermarriage, unless she herself be accessory to the contrary.

NOTWITHSTANDING, a woman, when she intermarries, suffers all power and will to the husband, and the marriage is, as it were, a general warrant of attorney, *ad lucrand.* *vel ad perdend.* in all her concerns whatsoever, during coverture: 4. Co. 60. it was not only adjudged that the wife could not make a will, but that the intermarriage has revoked her will which she had made before, because on her intermarriage her will was not her own but her husband's.

~~Then~~ she cannot complain if the husband prevents any benefit which might come to her, for it is herself alone that has given him the power; *et volenti non fit injuria*.

So then, in this case, the wife being under the power of her husband, he, by refusing to accept the use, incapacitates the wife to take, or at least to hold it; for her will is not her own, and she cannot, without him, assent or agree thereunto. 2. Hen. 7. 15. agreed, and so is the law, that a feme covert cannot be executrix to a stranger without the consent of the husband. 27. Hen. 7. 35. held, and so is the law, that a feme covert cannot disfeise neither to her own nor her husband's use without his assent; but that, notwithstanding the entry of the feme covert, the  
estate

estate remained where it was before, and nothing gained to her or her husband.

THESE instances shew the assent of the husband is absolutely necessary to enable the wife to take any thing. On the other hand, in some cases, the negligence of the husband may entirely defeat the whole estate of the wife; as if the husband of a wife, feoffee or lessee upon condition, fails to perform that condition, the whole estate is forfeited, and not for the husband's life only, as was adjudged 20. Hen. 6. 28. But if the husband disclaims all right to the wife's land in an avowry or *quid juris clamat*, that shall forfeit but for his own life; yet if the husband cease to pay rent for two years to the lord of the fee, the lord shall have a *cessavit*. N. B. 193. The effect of which is, a forfeiture of the whole estate. Plowd. 364. b. 20. Hen. 5. 28. Nay, in some case, the assent of the husband may prejudice the wife. Dy. 159. Husband and wife join in a lease for years of wife's land, rendering a small rent; then the husband forthwith dies, and the wife, before the day of payment, takes a second husband, who accepts the rent; then the second husband dies: it was held, that the wife could not avoid this lease, because she was concluded by her second husband's accepting the rent.

HEREBY we see that the freehold estates of the wife are mightily subject to the husband's will, and may be prejudiced and sometimes determined and destroyed by the negligence, misfeasance, agreement or disagreement of the husband.

Now, if our case had been by way of feoffment; that is, if the feme covert had been enfeoffed by her father, and livery and seisin had, and afterward the husband had dissented, I think it clear that the wife's right should have been totally defeated; for the livery being defeated by the husband's disagreement, the estate which depended on that livery must, of consequence, be extinguished; for without new livery no estate could accrue to the wife, and a new



livery is a new feoffment. But there is a diversity in this case; for if the feoffment to the feme covert were by deed, a bare disagreement by the husband *in pais* could not divest it; but his dissent must be a disclaimer, or some action upon record, otherwise on a parol feoffment, which consists merely in livery, for then a parol dissent of the husband is sufficient to defeat it.

Now, in our case, the feme covert takes not by livery, or any act of the common law, but merely by operation of the statute of uses; so that I take the husband's disagreement *in pais* to be sufficient to divest the uses, because it is but a use which, by effect of law, springs from the original estate of the covenantor.

AND such springing uses may arise and fall upon contingencies, because they are but the several offsprings of the separate and several considerations whereto their birth is incident; so that at the time the consideration takes place, then the use springs up to the party, and not before; and hereby several estates limited by way of use, by way of covenant to stand seised, may take effect, some at one time, some at another; as in a case where the father covenants to stand seised to the use of his daughter for life, and after her death to his son-in-law,

HERE, during the daughter's life, no use ariseth to the son but that is in expectancy on her death; and if the husband's disagreement should amount to an extinguishment on her part, yet the son can have nothing till after her death; because this sort of conveyance does not operate by way of transmutation of possession, but by way of a use springing out of the old estate; and this possession remains with the covenantor till the time of the limitation accrue: but it is otherwise where a conveyance waits a transmutation of possession; as if here the father had enfeoffed J. N. in fee to the use of his daughter for life, and after his death to the son and his heirs, then the son would take immediately; his remainder would be vested in him *eo instante* that

that the estate for life vested in the daughter, for the feoffor parted with all his estate; and then shall nothing remain to the feoffee when there is a possession *in esse* to take the use according to the limitation: otherwise of a springing use; therefore it may well be in our case that the husband's disagreement only suspends the wife's right during coverture.

If so, it follows, that the sentence of divorce calls the suspension, and by consequence the entry of the second husband, lawful; and thereby the estate was fully and completely vested in the second husband and wife, and a use so executed in them, that a subsequent disagreement of the second husband could not again divest it.

THE estate being thus vested, what will be the effect of the repeal of the sentence of divorce? Surely that of itself would divest the wife's estate which she had in her own right before the repeal, for the repeal is but a collateral thing.

AND if it be not divested by the repeal, it follows, that the estate was once vested in the wife of J. S. after his disagreement thereunto, and at that time his assent was not necessary to capacitate the wife, for she was not then to take; neither was it a purchase during the second coverture with J. S. but as it were a new original purchase accruing to her when she was under another quality.

THEN, if tantamount to an original purchase by her during the coverture of her second husband, it follows, that the first husband may enter, because it is not the same purchase to which the first disagreed, and therefore he ought to recover in this assise. Opinion.

## No. XV.

## CASE of BAGSHAW and SPENCER, in CHANCERY.

*The EDITOR has been favoured with the following Report of this important Case, from an original MS.; which, being much more full and correct than that printed in either ATKYNS'S or VEZEY'S REPORTS, will, it is presumed, be esteemed as a valuable Acquisition to the Profession.*

Mich. 22. Geo. 2.

In Canc.

Devise to trustees and their heirs, in trust to raise money to pay debts, remainder to the same trustees and their heirs, in trust for the use after mentioned, viz.

To the use of T. B. for life, without impeachment of waste, remainder to trustees to preserve and maintain, viz.

**B**ENJAMIN ASHTON, by will 7<sup>th</sup> September 1725, devised all his lands to five trustees, their heirs and assigns, in trust that they and their heirs should, in the first place, by the rents and profits, or by sale or mortgage of the premises, raise so much as should be necessary for the payment of his debts; and after payment thereof gave the same to his trustees for 500 years, without impeachment of waste, upon trust as after mentioned, and then goes on in these words: "And from and after the determination of the said estate for years, then I give and devise all my said lands, &c. unto my said trustees, their heirs and assigns, my mind being that my said trustees shall be and stand seised of the said premises, in trust to the several uses, behoofs, intents and purposes after declared, viz. As for one moiety of the said premises, I give and devise the same to the use and behoof of my nephew Thomas Bagshaw, for the term of his natural life, without impeachment of waste; and from and after the determination of that estate, to my said trustees and their heirs, for and during the life of the said Thomas Bagshaw, to preserve and support the contingent uses and remainders herein-after limited, but to permit the said Thomas Bagshaw to receive the rents and profits during

“ during his natural life ; and after his decease, then to the  
 “ use and behoof of the heirs of the body of the said  
 “ Thomas, lawfully begotten ; and for want of such issue,  
 “ then to my nephew Benjamin Bagshaw, for and during  
 “ his natural life, without impeachment of waste : and from  
 “ and after the determination of that estate, I give the same  
 “ unto my said trustees and their heirs for and during the  
 “ life of the said Benjamin Bagshaw, to preserve and sup-  
 “ port the contingent uses and remainders herein-after li-  
 “ mited, but to permit the said Benjamin Bagshaw to re-  
 “ ceive the rents and profits thereof for and during his na-  
 “ tural life ; and from and after his decease, then to the  
 “ use and behoof of the heirs of the body of the said Ben-  
 “ jamin Bagshaw lawfully begotten ; and in default of such  
 “ issue,” &c.

Remainder to  
 the heirs of the  
 body of T. B.

THEN follow the like devises to Charles and Robert Bagshaw for life, with remainders *ut sup.* reversion in fee to the testator's right heirs. And as for and concerning the other moiety of the premises, he gave the same to the use and behoof of his sister Christina Spencer, wife of William Spencer, for and during her life, without impeachment of waste, with like remainder to his trustees, to preserve the contingent uses and remainders therein-after limited ; and after her decease, then to the use and behoof of his nephew John Spencer, for and during his life, without impeachment of waste, with like remainder to his trustees, to preserve the contingent uses and remainders therein-after limited ; and from and after his decease, then to the use and behoof of the heirs of the body of the said John Spencer lawfully to be begotten ; and for default of such issue, came the like devises to Benjamin and William Spencer for life successively, with remainders to the heirs of their bodies ; and afterwards to the use and behoof of every other son on the body of the said Christina Spencer to be begotten ; and for want of such, then to the heirs of  
 the

the body of the said Christina lawfully begotten; and for want of such issue, then to his own right heirs.

THE testator declares the trust of the 500 years term to be for raising and paying of 200*l. per annum* to Christina Spencer for her life, for her separate use, and likewise to pay all his gifts and legacies, giving several pecuniary legacies to divers persons; and give all his personal estate to come in aid of his real, and be by his executors applied, in the first place, to discharging his debts and legacies.

AFTER the testator's death, Thomas Bagshaw, the first devisee of the moiety in question; died without issue in 1730, whereupon Benjamin Bagshaw, the second devisee, brought his bill for a performance of the trusts of the will; and 21<sup>st</sup> November 1732, it was decreed at the Rolls, That the proper accounts should be taken, and that so much of the testator's real estate as, together with the rents and profits received, should be necessary to pay his debts and legacies and the arrears of the annuity, or the whole of the said trust estate, in case the matter should find the same was for the advantage of the parties, should be sold, and the debts, legacies, and arrears of the said annuity to be paid out of the money arising from such sale. And the court reserved the consideration how the remainder of the trust estate, in case only part thereof should be sold, or in case the whole should be sold, how the lands to be purchased with such surplus money, should be limited.

IN the very same Term with this decree, Benjamin Bagshaw suffered a common recovery of his moiety of the estate, and by will devised it to the plaintiff Catherine Bagshaw, his wife, whom he made executrix, and died in January 1738.

CATHERINE BAGSHAW, the devisee and executrix, brought a supplemental bill, in nature of a bill of revivor, to have the former decree carried into execution, and to have the benefit of that moiety of the trust estate which Benjamin Bagshaw was entitled to. And the cause being

heard

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heard at the Rolls on this supplemental bill, 27th June 1743, his Honour declared, That Benjamin Bagshaw took an estate tail by the will of Benjamin Ashton; and decreed the estate in question, or such part thereof as should be necessary, to be sold according to the former decree; and that one moiety of the clear surplus of the purchase money should be paid and applied according to Benjamin Bagshaw her testator's will.

FROM this decree the infants John Benjamin and William Spencer appealed.

*Lord Chancellor Haydewicke.*

THE merits of this case depend on the will of Benjamin Ashton, the first testator, for nothing subsequent can materially vary that, but the right of the parties must be taken as it stood at his death; therefore, nothing that has been done by the first decree, nor by the master's report, must be allowed to have created any alteration: but, although there should be a surplus of money to be laid out in a purchase of lands, the construction must be exactly the same, and the new-purchased lands be settled on the very same uses as if the residue of the devised lands unsold had been now to be settled. Nor can the recovery and will of Benjamin Bagshaw, the devisee, make any alteration; but the rights of the parties, and the determination of the court, must be the same, as to all legal and equitable consequences, as if Benjamin Bagshaw had been living, and now praying a conveyance of this moiety to himself, according to the uses directed or required by the true construction of Benjamin Ashton's will. These things, being premised, reduce the case to two general questions arising on Benjamin Ashton's will.

1. WHETHER the estate devised to Benjamin Bagshaw in this moiety be a legal estate or use executed by the statute of uses, or whether it is but a mere trust in equity?

2. SUP-

First question.  
Whether T. was entitled legal or a trust estate under devise?

Second question.  
Whether it was  
an estate tail, or  
for life only, with  
remainders?

2. SUPPOSING it a mere trust in equity, whether it was an estate tail, or an estate for life only, with contingent remainders over to all the issue of his body successively?

As to the first question, I am of opinion, that this is a trust in equity. The first devise is to five trustees and their heirs. This carries the whole fee, in law. Part of their trust is to sell the whole, or a sufficient part thereof, for payment of debts and funeral expenses. This would have carried a fee by construction, had the word *heirs* been omitted out of the devise, because the trust is to continue for ever, and to sell and convey a fee. This was the opinion of the whole court of B. R. in *Shaw v. Weigh*, and not disputed upon the writ of error in the house of lords. If they may sell the inheritance in the whole or any part of the lands, not by force of a power, but by virtue of their estate, they must at law have a fee in the whole; for otherwise it must, from the nature of the thing, be uncertain what they have occasion to sell. No purchaser would be safe. On these grounds this case differs from *Cordell's case*, Cro. El. 315. cited in *Manning's case* 8. Co. 96. a. *Popham v. Bamfield*, 2. Vern. 79. *Randel v. Bookey*, Prec. in Chan. 162. and *Carter v. Barnardiston*, 1. Will. 505. for in all these cases neither the word *heirs*, nor any other words of limitation were inserted, nor was there any express *trust to sell*. These, therefore, were mere chattel interests in the nature of a tenancy by *elegit*, to hold till the debts were paid. The only case which made me doubt of this, is the case of *lord Say and Sele v. lady Catherine Jones*, before lord King, 16th November 1728, and affirmed in the house of lords, March 1729, as to this point. But, upon a strict examination, it differs in the most material part, and amounts only to a devise to the trustees and their heirs *during the life of Cecil Fiennes*; and then it was only an estate *pur auter vie*, on which a legal

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legal remainder might properly be limited; and so it was held.

THE consequence of this is, that here being the whole fee in law devised to the trustees, no remainder of a legal estate could be limited upon it, and that Benjamin Bagshaw could not take a legal estate in remainder in this moiety.

BUT it was argued, that if he could not take by way of remainder, he might by way of executory devise; and though a fee cannot be mounted upon an absolute fee simple, it may upon a determinable one. But I think Benjamin Bagshaw could not take a legal estate in this moiety by way of executory devise; or, if he might, he did not, and the Plaintiff, his devisee, cannot claim it from him: for, first, it seems to be too remote, being after *all* the testator's debts indefinitely should be paid; which may, in point of time, exceed the compass of a life or lives in being: secondly, the recovery suffered by him was before the debts were paid, and consequently before the contingency happened, while the freehold and the fee simple determinable (as it has been called) remained in the trustees; and consequently he could not make a good tenant to the *præcipe* to support his recovery, to bar the subsequent remainders. Hence it appears, that supposing this a good executory devise at law to Benjamin Bagshaw, it would prevent the estate from passing by his recovery and will, and entirely defeat the plaintiff's title; for, whatever makes void the recovery equally defeats the plaintiff, let the construction of the limitation *to the heirs of the body of Benjamin Bagshaw* be the one way or the other; and the reversion in fee would, at law, remain unbarred, and rest in the defendant John Spencer, who is now heir at law to the testator Benjamin Ashton. This makes it necessary for the plaintiff to admit, that all the devises subsequent to the first limitation to the trustees and their heirs,

are



are trusts in equity. And this brings me to the next and main question, viz.

Second question.  
Whether T. B.  
took an estate  
for life or an  
estate tail?

WHETHER the devise to Benjamin Bagshaw in this moiety of the trust estate be an equitable estate tail, or an equitable estate for his life only, with contingent remainders to the issue of his body successively? This will depend on the construction of the words, *heirs of the body of Benjamin Bagshaw lawfully begotten, or to be begotten*, as they stand in this will; whether they are to be taken as words of limitation, in which case he was tenant in tail, and his recovery good in equity; or as words of purchase, and then he was tenant for life only, and his recovery void.

In order to determine this question, which is the principal, three things must be considered: First, What appears to have been the testator's true intention in this devise? Secondly, Whether that intention be consistent with, and can take effect according to, the general rules of law or equity? Thirdly, Whether there be any particular settled rule or determination of this court, which will stand in the way of and prevent the testator's intention from taking effect? And under this last head I propose to consider the distinction between trusts executed and trusts executory; and the objection that has been so much urged from thence in the plaintiff's favour.

It was evidently  
the intention of  
the testator to  
create a strict  
settlement.

As to the first, I take the intention to be very clear. Nobody who reads this will with attention can doubt one moment whether the testator actually intended to make a strict settlement of his estate amongst all his nephews, the sons of his two sisters. For this purpose (amongst others) he vests the whole fee of the entire estate in trustees; and after directing the particular trusts, he divides it into moieties, giving one moiety to his nephews descended from his sister Mrs. Bagshaw, who was dead, and the other to his nephews descended from his sister Mrs. Spencer, who was then living, and for whom he carves out an estate for life.

life in that share. To every one of these nephews who were in being, and proper to be made tenants for life, he expressly devises *for and during the term of his natural life*, in the very same words in which he has penned his devise to his sister Mrs. Spencer, concerning whom there is no doubt that he intended to make her tenant for life, and no more. To every one of these devisees he has added the words *without impeachment of waste*; which clause, though it has been often held not to be alone sufficient to prevent the operation of law arising from subsequent words, yet it is one mark of his meaning to give such estate as would have been punishable for waste, unless these words exempted it from it. Then he devises to his trustees to preserve contingent remainders in these words: "And from and after the determination of that estate, I give and devise the same to them and their heirs for and during the life of the said Benjamin Bagshaw, to the intent and purpose to preserve the contingent uses and remainders hereinafter limited, but nevertheless to permit and suffer the said Benjamin Bagshaw to receive the rents and profits thereof for and during the term of his natural life."

This has been made the *cardo cause* on the defendant's side, and it speaks plainly several things. First, That the testator intended to give to his several nephews, and particularly to Benjamin Bagshaw, whose recovery is now in question, such an estate *only* as might be forfeited. The estate given to the trustees is *after the determination* of Benjamin Bagshaw's estate for life. Now, that estate could determine but two ways, by the expiration of the life, or by forfeiture. The former he could not mean, because the remainder to the trustees and their heirs is given *only* during the life of Benjamin Bagshaw, and consequently it would carry in it a contradiction in terms. He must therefore mean the latter, viz. a determination by forfeiture; and thence it necessarily follows, that his intent was to

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give Benjamin Bagshaw such an estate as might by law be forfeited. Secondly, The next thing plainly implied in this clause is, that there were contingent uses or remainders to be preserved. Now, throughout the devises of the moiety in question, in every one of which this clause is found, there are no contingent uses or remainders, unless the limitations to *the heirs of the body* of the several nephews of the name of Bagshaw are allowed to be such.

THE question then upon the point of intention comes to this: Whether these circumstances are not as strong to indicate an intent to restrain these devises to be *for life only*, as if the testator had inserted the words *only*, or *non aliter*, or any other negative words? which in *King v. Melling*, 1. Vent. 225. were admitted by lord Hale; and in *Backhouse v. Wells*, Hil. 10. Ann. B. R. were adjudged by the whole court, to give an estate for life, not absorbed by the subsequent limitation. And I am of opinion that they are; for if the testator has thereby declared his meaning to give such an estate for life as would have been subject to impeachment for waste if he had not expressly exempted it, and as might, according to the rules of law, be forfeited, and as was to be followed by contingent remainders and not by limitations of the inheritance to the tenants for life, it amounts to the same as if he had in express words declared his meaning to be, to give no more than an estate for life to Benjamin Bagshaw, and contingent remainders to those persons who should be heirs of his body.

THE plaintiff's counsel were under great difficulties to frame any plausible argument to shew a shadow of intention in favour of their construction; and the only thing they relied upon was, that the testator had shewn he understood the difference between *words of limitation* and *words of purchase* proper to create a contingent remainder; and that therefore, in devising the other moiety to the sons of his sister Mrs. Spencer, after he had gone through all her sons in being, he devised it to her after-born sons by the

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the words, "every other son of the body of the said Christina Spencer, lawfully begotten, or to be begotten, and the heirs of the body of every such son, as they shall be in seniority of age and priority of birth;" whence, said they, it appeared he knew the words *heirs of the body* would create an estate tail. But I think this difference affords an observation of a contrary import, and strengthens the evidence of intention on the other side. It shews, that as to sons *already born*, the testator, or the drawer of this will, knew that he could make them only tenants for life, with contingent remainders over; but that as to *sons unborn*, he could not make them tenants for life so as to carry on contingent remainders to their issue. In this view, therefore, he has left out the words *for and during their natural lives*, and *without impeachment of waste*, and has interposed no clause to preserve contingent remainders between the devise to those *after-born sons*, and the limitations to the heirs of their bodies; than which nothing can be stronger to demonstrate, that in the one case he meant to give a mere estate for life, and to use the words *heirs of the body* as words of purchase, descriptive of their sons and daughters, and in the other case to give an estate of inheritance, and to use the words *heirs of the body* as words of limitation, because the law would not suffer him to limit a contingency after a contingency, and to carry on contingent uses further.

SECONDLY, The next question is, admitting this to have been the testator's intent, Whether that intent be consistent with, and can take effect according to, the general rules of law or equity? And here the plaintiff's counsel placed their great stress; for they said, that the law will not suffer a man, even by will, to create limitations contrary to its own rules; and that if he attempts to do so, the law will supersede his intention, and reduce his gift to such an operation as it will allow; that a clear rule is established ever since Snelley's case, 1. Co. 104. a.;

Whether that  
intention be  
consistent with  
general rules.

that wherever by any gift or conveyance the ancestor takes an estate of freehold, and by the same gift or conveyance an estate is limited, either mediately or immediately, to the *heirs of his body*, those words are words of limitation, and not of purchase, and unite with the estate of freehold, so as to give him the inheritance.

To go by steps. I admit the general principle, that the law will not suffer a man to create limitations contrary to its own rules; and if he intends to do it, will supersede his intention. But I apprehend it is misapplied in the present case. The true application of this principle is to the nature and operation of the estates intended to be created by such limitations, and not to the construction of the words. I will not say, that this principle has never been applied to the construction of some particular technical words, to which the law has fixed a certain, appropriate, unvariable sense; but even then it has been applied unskilfully, and without proper distinction. The true meaning of the principle is what I have laid down; therefore the law will not suffer a man to create a perpetuity by a will, any more than by a deed; nor to put the freehold of land in abeyance, so as that there shall be no person to perform the services, or to make defence in a *præcipe*; nor to limit a fee upon an absolute fee simple; nor to make a chattel descendible to *heirs generally*. Consider what is the reason of this. It is, because it would be changing the law, and varying by private persons the rule of property which the law has established. This, therefore, is not from a want of power in the testator; it is what he cannot do by any words whatsoever. But in the case in question, here is no want of power; for there can be no doubt but the testator might devise his lands for such estates for life, and with such contingent remainders as are contended for by the defendants. The only objection is, that he has used improper words, which the law will not allow to have that operation, notwithstanding his intention is plain. But

is

is not this very hard to say, and repugnant to the first and fundamental rules of law in expounding wills? Those rules are, that the intention of the testator shall govern the construction of the words; that the testator is presumed to be *inops consilii*; and therefore, if his intention appears to be lawful, although he uses barbarous or inapt words in his will, the law will construe those barbarous or inapt words into words proper and sufficient, according to that intention which appears in his will. This is laid down in *Boraston's case*, 1. Co. 20. b. and *Manning's case*, 8. Co. 95. and has been adhered to ever since. Now what is the objection here? Is it any more than that the testator has used words inapt and improper to create contingent remainders? But does not the fundamental rule of construction say, that if the intention appears, the law will expound and mould those inapt and improper words in such a sense as will serve his intention; which cannot be done here without construing *heirs of the body* as words of purchase, descriptive of the sons and daughters of the first taker and their issue. However, it is still urged, that the law has affixed so peculiar a sense to the words *heirs of the body*, that they can be nothing but words of limitation, and operate to enlarge the estate of the first taker, according to *Brett and Rigden's case* in *Plowden*, and *Shelley's case*, and cannot be words of purchase.

The words "heirs of the body" are often construed to be words of purchase.

THIS is the ground. Try it, and see whether it will hold. It is so far from holding, that there are many cases, even at law, in which the words *heirs of the body*, as well as *issue*, have been held words of purchase. *Archer's case*, 1. Co. 66. b. The words there were, indeed, *next heir male*, in the singular number; yet that was not the reason of the determination, but because words of limitation were added after them, and these words were only demonstrative of the testator's intent in using the first words. *Clarke v. Day*, Moor 592. the testator devised his lands to his daughter *Rose* for life; "and if she marry after my decease,

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"and have issue of her body begotten, I will that *her heir*,  
 "after my daughter's death, shall have the lands, and to  
 "the heirs of *their bodies* begotten, remainder over to a  
 "stranger;" it was adjudged that the daughter had not an  
 estate tail, but only for her life. So in a case cited by lord  
 Hale, in *King v. Melling*, and *James v. Richardson*,  
 1. Vent. 334. and Pollexf. 457. and 2. Vent. 311. by the  
 name of *Burchet v. Durdant*. To the same purpose is  
*Long v. Beaumont*, in the house of lords, in May 1714.  
 I chuse only to refer to these well-known cases. But  
 upon this point a stronger authority than all these is *Lisle*  
*v. Gray*, sir T. Jo. 114. Pollexf. 522. and sir T. Raym.  
 315. where John Lisle covenanted to stand seised of lands  
 to the use of himself for life, remainder to his son Ed-  
 ward for life, remainder to the first son of Edward in tail,  
 with like remainders to his second, third, and fourth sons;  
 and so separately and respectively to each of the heirs  
 male of the body of Edward, and the heirs male of their  
 bodies, remainder over to William Lisle. Edward suf-  
 fered a recovery, under which the defendants claimed, and  
 William Lisle was plaintiff's lessor. The question was,  
 Whether Edward had an estate tail executed in him before  
 the birth of any son? But adjudged that he had only an  
 estate for life; for it was an estate for life limited to him,  
 and an estate tail to his four sons, because limited to the  
 heirs male of their bodies; and it was intended that each of  
 the sons should take in the same manner, for that the words  
*to each of the heirs male of the body of Edward* ~~and to each~~  
 each other of the sons; and the rather, because of the limi-  
 tation over ~~to the~~ *the heirs male of their bodies*, which was not  
 necessary to create an estate tail in Edward; and judgment  
 was given *pro quer.* It is said in sir T. Jones, that judgment  
 was given *pro def.* but that is either a mistake of the re-  
 porter, or a misprint; for the case is reported 2. Lev. 223.  
 and there it is said to have been held, that Edward took  
 only an estate for life, and that the word *so* signified *codem*  
*modo*, and that Edward had but an estate for life from the  
 manifest

manifest intent of the conveyance, and that judgment was given *pro. quer.* Sir T. Jones says, that this judgment was reversed in the exchequer chamber; but that also appears to be a mistake, for the record has been searched, and it is entered Trin. 30. Car. 2. Rot. 141. B. A. and there it appears that this judgment was affirmed in the exchequer chamber. This was adjudged even upon a limitation in a deed, where the same latitude of construction is by no means to be allowed as upon a will, and is therefore the strongest authority that the law has not invariably pinned down the words *heirs of the body* to be always words of limitation, but they may sometimes be taken as words of purchase.

To this it was said, that in *Lisle v. Gray* there were several words; the first, second, third, and fourth sons, mentioned in the first place, and afterwards, *and so separately and respectively to each of the heirs male of the body of Edward, and the heirs male of their bodies*; that the words *and so* were relative words, signifying *eodem modo*, and the word *each* divided them and pointed out particular persons, and words of limitation were added to them, and therefore no other construction could be made. All this I agree to; but still it is an authority that the words *heirs of the body* may, at law, and upon a deed, be construed as words of purchase, if the intention requires it. Those other words were only proofs and signs of that intention; and then the question will be, Whether there are not as strong signs and proofs of such an intention in the present case? for the argument is clear and unanswerable, that if some words in a deed, or will, demonstrating the intention of the maker, will turn the words *heirs of the body* into words of purchase, then other words in a deed or will may equally do so, provided they do equally demonstrate the intention. There can be no magic, or particular force, in certain words more than others, but their operation must arise from the sense they carry.



Case of Coulson  
v. Coulson  
stated.

BUT to this a considerable authority has been objected, to prove that the interposing a remainder to trustees to preserve contingent remainders between the first taker for life and the devise to the *heirs of his body*, is not sufficient to turn those latter words into words of purchase, or warrant such a construction; that is, *Coulson v. Coulson*, determined by all the judges of B. R. on a case sent out of this court: whereupon they certified their opinion, 8th May 1714, that there being, after the determination of the estate for life to Robert Coulson, a devise to trustees and their heirs for and during the life of Robert Coulson, they were of opinion, that by reason of that remainder interposing between the devise to Robert for life and the subsequent limitation to the heirs of his body, the said Robert Coulson took an estate for life, not merged by the devise to the heirs of his body, but by that devise an estate tail in remainder vested in the said Robert Coulson. It must be admitted, that this resolution is a clear authority, that upon the will then in question, the inserting a limitation to trustees to preserve contingent remainders, was not sufficient to change the sense of the words *heirs of the body* into words of purchase, and to make the issue take by way of remainder, even though there were no other contingent remainders in that will. Nobody can have a greater regard for the opinion of the judges who made that certificate than I have; but it differs widely from the present case.

FIRST, In that will there was no clause ~~with intent to~~ *prevention of waste*; but, perhaps, that may be thought not to deserve much weight.

SECONDLY, It was a devise of a *legal estate*, and not a devise to trustees upon certain trusts. There the words must be taken as they stood, and the judges were bound to understand them according to their legal operation. No conveyance was to be made, nor any subsequent act to be done. They might think they could not take into consider-

consideration the trust of the estate limited to the trustees to support contingent remainders, but only the legal estate so limited, and how that, separately taken, would operate. But in the case now in judgment, all the limitations relative to the present question are of a trust; the construction and direction whereof is the proper subject of the jurisdiction of this court; which the court is bound to execute according to the testator's intention. This was determined by the master of the rolls, and in that I agree with him. The consequence arising thence is, that a greater latitude is to be allowed in the construction of the words, in order to comply with the intention, since they are to be modelled and reduced into a conveyance by the act of the court.

THIRDLY, The last observation I shall make upon this case is, that the opinion of the judges furnishes a new light in the present cause, which did not appear at the time of the last decree made by the master of the rolls; for the judges held, that the interposing the remainder to the trustees and their heirs, *pour autre vie*, between the estate for life to Robert Coulson and the limitation to the heirs of his body, prevents the estate for life from uniting with, or being merged in, the inheritance; and that he took a distinct estate for life, with a remainder to himself in tail. I desire this may be remembered, for the sake of the use I shall make of it by and by; for I think it affords a decisive argument that, in directing the conveyance, the court must depart from the words of this will. But upon the construction of the limitation the great difference between the two cases is, that in Coulson v. Coulson the devise was, as I observed before, of a mere legal estate, and in the present the devise is of a trust in equity.

THE answer relied upon to this distinction has been, that limitations of trusts, and of legal estates, are governed by the same rules, and the construction must be the same in both; since, otherwise, one rule of property will prevail

Difference between a devise of a trust and a mere legal estate.

at law, and another in chancery, which ought not to be admitted; and for this were cited lord Nottingham's concessions in the duke of Norfolk's case, 3. Chan. Ca.

ALL these concessions I shall allow and adhere to in a sound sense; and I agree that the rule of property is not to prevail at law, and another to be set up in chancery. But let lord Nottingham's concessions be rightly understood. He nowhere says, that the construction of the words must, in both cases, be exactly the same; or that a court of equity, when it is bound to direct a conveyance, cannot expound them more liberally to comply with the party's intention: his words are, "The limitation of the trust of a term, and the limitation of the estate of a term, all depend on the same reason." And afterwards, "It is agreed all along, that the *measures of the limitation* of the trust of a term, and the measures of the limitation of the estate of a term, are all one; and there is no difference in chancery and at common law, between the rules of the one and the rules of the other; what is good in the one case, is good in the other." What is my lord Nottingham's reasoning here applied to? *The measures of the limitation*; that the limitations cannot be carried further in the one case, than the law will allow in the other. And this appears clearly to be his meaning by the words immediately following, where he says, "And therefore the court is agreed, too, that the limitation of the remainder of the term for years after an estate-tail in the term is void." To this, the argument, "The wise would be setting up one rule of property at law, and another in chancery," is properly applied; for the measures of the limitations, or the extent to which they may be carried, do essentially concern the rules of property, and how near we may approach to a perpetuity; which was the great contest in the duke of Norfolk's case. But the more or less liberal construction of the words to comply with the intent, does not concern or affect these rules.

rules. If the court is at liberty to find out the true meaning of the testator, delivered from the technical use of the words, and in conformity thereto directs the conveyance within the rules of law allowed for such limitations, lord Nottingham's doctrine is complied with, and the mischief which he condemns avoided.

UPON this reasoning many resolutions of this court have been founded, which were cited at the bar.

I SHALL begin with that of *Papillon v. Voyce*, because it establishes the distinction between a *legal estate* and a *trust*, in the same case, and upon the same will. It was first decreed at the rolls by sir Joseph Jekyll, 11. Dec. 1728, afterwards affirmed by lord King, 5th Feb. 1731, and is now reported, 2. Will. 471. Samuel Papillon devised 10,000 *l.* to trustees, to be laid out in land and settled upon his son John Papillon for life, without impeachment of waste; and from and after the determination of that estate, to trustees and their heirs during the life of John Papillon, to preserve contingent remainders, remainder to the heirs of the body of John, with remainders over, and a power to John to make a jointure. By the same will the testator devised lands in possession in Essex to John for life, without impeachment of waste; and from and after the determination of that estate, to trustees and their heirs, during the life of John, to preserve contingent remainders; and from and after his decease, to the heirs of the body of John, with remainders over. Upon this will it was decreed by the master of the rolls, that as to the devise of the lands in possession, an estate for life only passed to John Papillon, with the remainder to the heirs of his body by purchase; and that the deeds and writings relating to the lands should not be delivered to John, but brought into court for the benefit of all parties interested; and that as to the money to be laid out in land, and settled to the same uses, the court had most evidently a power over that; and therefore it should be settled so as to make John tenant

Case of Papillon  
v. Voyce, stated.

nant for life, and that his sons should take in tail male successively as purchasers, according to the intent of the testator. The cause coming afterwards upon an appeal before lord King, he reversed so much of the decree as related to the deeds and writings, and the lands in possession, and ordered them to be delivered to the plaintiff John Papillon; but affirmed that part of the decree which related to the money to be laid out in the purchase of land.

UPON this precedent several things are to be observed of weight in the present case.

FIRST, That both the judges who heard and determined that cause concurred, and were clear in their opinion, that the testator's intention was plain to give an *estate for life* only to John Papillon, with contingent remainders of the inheritance to his sons and daughters; and this founded principally on the clause appointing *trustees to preserve contingent remainders*; and that as to the trust estate to be purchased and settled, this court was bound to conform to that intention, notwithstanding the technical force of the words *heirs of the body*, and to direct the settlement to be made accordingly.

SECONDLY, That sir Joseph Jekyll, who took much time to consider of the case, and made his decree on great deliberation, was of the same opinion as to the *legal estate* devised in the lands in possession; and held, that the same intention would govern in both. As to this point, indeed, lord King differed from him, and declared his opinion, that as to the *legal estate* devised in the lands in possession, it was at law an estate tail by force of the words *heirs of the body*. But it must be observed, that it was not at all necessary for lord King, to give an opinion upon this point; and it was, in a manner, extrajudicial, because the plaintiff's marriage-articles, whereupon a supplemental bill was brought after the first decree, were admitted and read in the cause, and by them he was clearly intitled in equity to an estate tail in the lands in possession; so that

it

it was not in the testator's power to devise, and his will did not operate upon them. However, I admit he declared that opinion; but upon this part of the case there is something remarkable, which I perfectly remember, and appears by the notes I then took in court upon the back of my brief. The cause was heard on the appeal and supplemental bill, on a Saturday, the regular day for appeals: then lord King declared the opinion I have mentioned, and said, he would not then pronounce his decree, but consider of it till Monday. On Monday he said he had looked into the case of *Lisle v. Gray*, and that it was indeed very strong; and he seemed to be less clear in his opinion as to the point of law on the limitation of the *legal estate*, than he was the day before: but as the supplemental bill had brought a new title for the plaintiff in the cause, he did not stay to give it any further consideration; but affirmed the decree as to the settlement of the trust estate; and as to the deeds and writings concerning the title of the lands in possession, reversed that part of the decree at the rolls, and ordered them to be delivered to the plaintiff. But it was very observable, that he took care to express in his decree, that his direction was founded on the supplemental bill; and so it appears by the Register's book. This looks as if he had a mind to avoid any decision of this point upon the will; and the record of the decree makes it no decision.

HOWEVER, since *Coulson v. Coulson*, I will urge *Portington v. Woyle* no farther than as an authority (and so far it is a great one), that upon a trust estate created by a will, a devise so penned ought to receive this construction, and the court to direct a conveyance accordingly. And in this the court was clearly warranted by former precedents, as in *Leonard v. earl of Suffex*, 2. Vern. 526. where lord Cowper decreed an estate for life, without impeachment of waste, because, the estate being only executory, the intent and meaning of the testatrix was to be pursued,

pursued, she having declared her mind that her sons should not have it in their power to bar their children. Upon this case I will only make this observation, agreeable to lord Cowper's opinion, that had the devise been of a *legal estate* in the land, with such a clause accompanying it, *taking special care in such settlement that it never be in the power of either to dock the entail &c.* the sons must have been tenants in tail, and that clause would have had no operation; but yet upon a trust in equity it governed the whole, as a demonstration of the testator's intention, and turned them into tenants for life. I think it will be difficult to shew, why the devise in the will in question to trustees *to preserve contingent remainders* will not have the same operation.

Case of sir J.  
Hobart v. lord  
Stamford, cited.

ANOTHER great authority to this purpose is, sir John Hobart v. earl of Stamford, decreed also by lord Cowper, 19th Dec. 1709, affirmed in the house of lords. I must spend a little time in stating this case particularly, because I have seldom found it correctly stated, or the determination explained in its proper force.

MR. Serjeant Maynard, by his will, devised his estate to trustees and their heirs, to the use of them and their heirs, upon several trusts, viz. That the trustees (after the death of his wife) should convey part thereof to the use of or in trust for sir H. Hobart and Elizabeth his wife (the testator's grand-daughter) for their lives, and the life of the survivor; the remainder to the first son of the said Elizabeth for 99 years, if he should so long live; remainder to the heirs male of the body of such first son; remainder to all and every the sons of Elizabeth for 99 years, if they respectively so long should live; remainder to the heirs male of every of them, to take, not jointly, but successively; the son and sons to take the term of 99 years, *with immediate remainder* to his and their said heirs male; remainder to Mary Maynard, his other grand-daughter (afterwards countess of Stamford), for her life; with remainders

to all and every her sons for such like term of 99 years; with remainders to the heirs male of the body of every such son. He further willed, that the other part of his estate should (by the advice of counsel) be conveyed to, or to the use of Mary Maynard for life, without impeachment of waste; remainder to all and every her son and sons for 99 years, if such son or sons should so long live; with several remainders to the heirs male of the body of every such son, they and all the heirs male of their bodies to take successively, each son to take the said term, with remainder *immediately* to his said heirs male; and after the determination of the said estates, and failure of such heirs male of their respective bodies, the remainder thereof to his other grand-daughter, the lady Hobart, and her sons, with the like terms and remainders; the remainder of all the estate to trustees and their heirs, during the life and lives of sir Henry Hobart and dame Elizabeth his wife, and of the countess of Stamford, to preserve contingent estates, *and to no other use or purpose.*

MR. serjeant Maynard died. Several suits arose about his will; and in 1694 a private act of parliament was made, directing that his real estate should go to, and be enjoyed by, *such persons, for such estates, and under such limitations, as were mentioned in the will.* This act was no otherwise material than as it let in two terms of 99 years for the benefit of the earl of Stamford and sir H. Hobart, if they should so long live (in case they should survive their wives), in the respective parts of the estate. Sir H. Hobart and his lady died, leaving sir John Hobart (now earl of Buckingham), their only son, an infant, who brought his bill to have a conveyance executed by the trustees, pursuant to the will and act of parliament. Lord Cowper, 24th of Jan. 1707, decreed the trustees should execute conveyances according to the will and the words of the act of parliament, and referred it to a master to settle the conveyance.



# CASE OF BAGSHAW AND SPENCER.

THE master made his report, whereby he allowed the draught of a conveyance in general words, referring to the will and act of parliament, thus: *To convey the premises to Clayton and Carter and their heirs, habendum to them and their heirs, to several uses, intents, and purposes, in the plaintiff's will and act limited, expressed, and declared.*

To this report and draught sir J. Hobart excepted, that the premises ought at least to have been limited to the use of Carter and Clayton and their heirs, only, in trust for such person and persons, and for such state and estates, as are in and by the said will and act of parliament limited, whereby the legal estate might be vested in the said trustees for the better preservation of the contingent estates and limitations; which otherwise, as the draught was prepared, were liable to be destroyed, and the testator's intention plainly defeated.

THE master of this exception was argued 19th Dec. 1709, before lord Cowper, who declared, that in matters executory, as in case of articles, or a will directing a conveyance, where the words of the articles, or will, are improper or informal, the court will not direct the conveyance according to the improper or informal expressions of the will or articles, but will order the conveyance or settlement to be made in a proper and legal manner, so as may best answer the intent of the parties. He conceived the intent of the will to be, that the estates should be secured, as far as the rules of law would admit, to the issue male of the respective devisees, before the cross remainders should take place, and that it was designed to be as strict a settlement as possible by law. His lordship did therefore order, that in the said conveyance, where any part of the estate was limited in use to the plaintiff sir J. Hobart, for 99 years, if he should so long live, there should be a limitation over to trustees and their heirs during his life, to preserve the contingent uses in remainder, and then to the first and other sons of sir J. Hobart in tail male successively;

sively; and where any part of the estate was limited to the countess of Stamford for life, and then to the earl of Stamford for 99 years, if he should so long live, that there should be a limitation also to trustees, and their heirs; during the lives of the said earl and countess, and the survivor of them, to preserve the contingent uses in remainder; and then to the first and every other son of the countess of Stamford, and the heirs male of the body of such first and every other son, and then to the right heirs of sir John Maynard; which right heirs were the countess of Stamford and sir John Hobart. This is the order which was affirmed by the house of lords.

It may be worth while to stop a little to observe upon this case.

FIRST, Both this court and the house of lords construed the words *heirs male of the body of the first son of lady Hobart* in the sense of *the first and every other son of such first son*.

SECONDLY, Taking the limitation as it stood in the will, and reducing the words, or even the strict legal operation of these words, into a conveyance by deed, the limitation to *the heirs male of the body of such first son* was void in law; for the estate limited to such first son was for 99 years only, and not a freehold; and consequently could not, within the doctrine of Shelley's case, unite with the limitation to *the heirs male of his body*; and by way of contingent remainder it could not be good, because there was no estate of freehold to support it. Hence it followed necessarily, that had these words been inserted in a conveyance, the freehold and inheritance must, at law, have vested in the co-heirs of sir J. Maynard; and yet the court made good the whole by inserting an estate to trustees to preserve contingent remainders.

THIRDLY, The private act of parliament did not direct any limitations to trustees to preserve contingent remainders after the estate to the earl of Stamford for 99

years, if he should so long live; and yet that <sup>was</sup> also directed.

FOURTHLY. mr. serjeant Maynard had inserted an express clause in his will, directing trustees to support contingent remainders after the devises for life to sir Henry Hobart, lady Hobart, and the countess of Stamford; and therefore it might have been argued, and undoubtedly was so, that where the testator intended such estate to preserve contingent remainders, he had inserted it; and, consequently, where he had omitted it, did not intend it should be done. Farther, the will concluded with negative words, *and to no other use or purpose whatsoever*. This was a much more plausible objection than what is drawn in the present case from the different penning of the devise of the other moiety to the after-born sons of mrs. Spencer, and yet it did not prevail against the testator's governing intention, to make a strict settlement.

THESE cases were precedent to that of Papillon v. Voce. But that authority has been followed by others subsequent.

Case of Ashton  
v. Ashton, cited.

ASHTON v. ASHTON, 14th Nov. 1734, before sir Joseph Jekyll. Joseph Ashton, by his will, gave 1200*l.* in money, and 6000*l.* South Sea annuities to trustees, in trust, as soon as conveniently might be after his death, to sell the same, and lay out the money in a purchase of lands of inheritance to be conveyed to George Joseph Ashton for life, and after his death *to the issue of his body lawfully begotten*; and for want of such issue, to his nephew Henry Ashton in fee. George Joseph Ashton brought his bill for a performance of this trust; and at the hearing of the cause, one question was, What estate the plaintiff ought to take in the lands to be purchased, whether for life only, or in tail? it being insisted on his part, that had this been a devise of the lands, he would clearly have been tenant in tail, and the trust ought to receive the same construction. But the court held, that he ought

to be made tenant *for life* only of the lands to be purchased, and decreed that they should be conveyed to the plaintiff for life, with remainder to trustees to preserve contingent remainders; with remainder to his first and other sons in tail general; with remainder to his daughters in tail as tenants in common, and not as joint-tenants, with cross-remainders between them; remainder in fee to the defendant Robert Ashton. This decree has stood without being appealed from. But here I must take notice, that the words of the limitation are *issue of his body*, and not *heirs of his body*, as in the present case. But it has been established ever since the case of *King v. Melling*, that in a will the words *issue of the body* are as strict proper words of limitation as the words *heirs of the body*, and equally give an estate tail in lands legally devised; and so it would undoubtedly have been in the case of *Ashton v. Ashton*, had it been a devise of the lands. What changed that construction in the case of *Backhouse v. Wells*, was the word *only*, which imported a negative.

THE next case I shall mention is that of *Withers v. Algood*, decreed by lord Talbot 4th July 1735. I shall state it from the Register's book; and it was this: Isaac Algood being seised in fee of some ground-rents, and of certain terms for years in houses, by deed dated 10th Feb. 1714, conveyed the same to trustees, to hold such part of the premises as was freehold *to the use* of the trustees and their heirs, and such part as was leasehold to the trustees, their executors and administrators, upon trust that they should apply the rents of the premises, and the benefit of the redemption thereof, to the plaintiff Hannah Withers for life; and after her death, *to the heirs of the body of the plaintiff Hannah Withers*, and of Isaac Algood, since deceased, and of Hannah Glas and Mary Algood, and to their heirs executors administrators and assigns, during the continuance of the estate in the premises. After the testator's death, Hannah Withers, jointly with her husband, brought her

Case of Withers  
v. Algood, cited.

bill for a redemption of certain mortgages which were upon the premises devised, and for a performance of the trusts of the will. At the hearing, one question was, What estate the plaintiff Hannah took in her share of the premises by virtue of this trust, whether for life or in tail? And, upon argument, lord Talbot was of opinion, that she took only an estate *for life*, and has declared it in his decree in these words: *That the plaintiff, Hannah Withers, is intitled to the equity of redemption of the freehold and leasehold premises comprised in the deed of trust during her life.* Accordingly he decreed the redemption to her as tenant for life, with proper provisions for securing the principal money upon the remainders of inheritance in the estate, and for keeping down the interest, during her life, out of the rents and profits. You observe, that in this case the words *these heirs of the body*, and yet were held to be words of purchase. I am sensible that it has been endeavoured to be distinguished by saying, that *the heirs of the body of Hannah Withers* were joined in the devise with other persons who clearly must take by purchase by way of remainder, and that shewed the donor's intent that they should all take in the same manner by purchase. But what does that amount to? Only that a plain indication of the testator's intention will change those words from words of limitation of estate into words of purchase, which is all that is contended for in the case now in judgment. For this argument was not conclusive, nor did create any absolute necessity to make them words of purchase; since, if it had been a grant of a legal estate, Hannah Withers must have taken one-fourth part of the inheritance as tenant in tail, and the other three-fourths have gone after her decease to the grantees in remainder. In a report which I have seen of this case, lord Talbot said expressly, *That the rule of law is not so strict as to controul the intent of the party, where plain.*"

THE last authority which I shall cite under this head, is that of lord and lady Glenorchy v. Bosville, which was decreed by lord Talbot, Hil. 1733, and where the principal question at the hearing was, Whether by virtue of sir Thomas Pershal's will, lady Glenorchy was intitled to be tenant in tail, or for life only?

THIS cause came on first before lord King, who took time to advise, and to have the opinion of the judges. It afterwards came on before lord Talbot, who, after long argument and deliberate consideration, held, that she was entitled only to an estate for life, with remainder to her husband for life; remainder to trustees to preserve contingent remainders, with remainder to her first and other sons in tail; remainder to her daughters in tail, with other remainders over; and decreed a settlement accordingly. Notwithstanding this, he held, that according to King v. Melling's case, the words *issue of the body* were as proper words of limitation in a will, as the words *heirs of the body*; and that if this had been a devise of a legal estate, lady Glenorchy would have been tenant in tail; but that it being the case of a trust, *circumstanced as that was*, he was at liberty to make a different construction, to comply more strictly with the testator's intention. I cite this case at present, merely as another authority in general, That the word *issue*, though admitted to have the sense of the words *heirs of the body*, was construed as a word of purchase, to comply with the testator's intention; and I shall reserve to my next head that part of my lord Talbot's reasoning which turns upon the distinction between trusts executed and trusts executory, which has been so much insisted on for the plaintiff.

BUT before I quit this precedent I must observe, that there were considerable arguments arising upon the penning of sir Thomas Pershal's will, to rebut the supposed intention to make lady Glenorchy only tenant for life, in case she married according to the direction of the will,

## CASE OF BAGSHAW AND SPENCER.

which she had done; for, in the other event of her not marrying according to that direction, he had directed one moiety of the estate to be conveyed to her for life, with remainder to trustees to preserve contingent remainders, remainder to her first and every other son, being a protestant, in tail; whereas, in the other case, it was barely limited to her for life, then to her husband for life, and then to the issue of her body generally. Hence it appeared, that the maker of this will knew the difference between a general limitation in tail and a strict settlement; and knew also how, and in what place, properly to insert trustees to preserve contingent remainders when he intended it. This furnished a much stronger objection than that which is drawn in the present case from the limitation of the other moiety to the after-born sons of mrs. Spencer, and yet it did not prevail to support the legal construction of the words against the manifest general intention of the testator.

Third question.  
No distinction  
between trusts  
executed and  
executory.

THIS case leads me naturally to the third and last question. Whether there is any particular settled rule or determination of this court which will stand in the way of and prevent the testator's intention from taking effect? And under this head I propose considering the distinction between trusts executed and trusts executory.

FOR the plaintiff it has been objected, that two particular settled rules stand in the way.

FIRST, That although in decreeing an execution of marriage-articles entered into for valuable consideration, the court, in order to render the contract of the parties effectual, will make such a construction as is contended for by the defendant; yet upon a will under which all parties claim voluntarily, the words *devising a trust estate* must be taken as they are, and the court is not at liberty to depart from them.

SECONDLY, That even in the case of wills there is a difference established between trusts executed and trusts executory.

executory. That, for instance, where the devise is to the use of *A.* and his heirs in trust for *B.* and the *heirs* or *issue* of his body, that is a *trust executed*, and the court cannot vary the words. But where the devise is to the use of *A.* and his heirs upon trust to convey the estate to *B.* and the *heirs* or *issue* of his body, that is an *executory trust*, and the court has a greater latitude to model and frame it so as to answer the intention.

THE leading authority to support the first objection is that of *Bale v. Coleman*, decreed by lord Cowper 26th July 1708; and afterwards on a re-hearing by lord Harcourt, 28th April 1712. Register's book 1710. lib. A. 309. reported 2. Vern. 670. and 1. Will. 142.

IN support of the latter objection several cases have been urged. I will, in the first place, consider the first objection. It is very true, that a difference has been allowed between the construction of marriage articles for a *valuable consideration* and of trusts in wills, notwithstanding that it has been admitted that the intention of the party ought to prevail in both. For this reason it is, that I have not cited any one case arising upon articles for a *valuable consideration*. But I beg leave to deny the proposition which has been laid down, that because under a will all parties claim as volunteers, therefore the words devising a trust estate must be taken as they are, and the court cannot depart from them. There is a multitude of authorities in this court to the contrary, several of which I have cited already; and it must, of necessity, be so. For as the court is, in most of those, bound to decree a conveyance of the legal estate, if it should insert in the conveyance the very same words of limitation which are found in the will, they would often have a different operation in a deed, and carry a different estate from that given by the will. There are various cases of this sort; but to put one plain instance instead of many,—the word *issue* in a *will* is generally and properly a word of *limitation* of estate; but in a *deed*, it is



always a word of *purchase*, and must operate accordingly. What, then, follows from hence? The court must, in all such cases, make a construction of the words of the will according to the testator's intention, which amounts to this: That it is bound to depart from the *very words*, in order to comply with the *intent* appearing in the will; *i. e.* upon the whole frame and texture of the testament.

I will now examine the case of *Bale v. Coleman* a little particularly.

Case of *Bale v. Coleman*, stated.

WILLIAM STAWELL, by will 2d June 1702, devised to four trustees and their heirs all his manors and lands, to the intent they should, by sale or leasing, pay his debts; and the residue of the premises to the same four persons, their heirs and assigns, equally to be divided between them. By codicil of the same 10th June 1702, the testator declared his will to be, after his debts paid, and a division made of the remainder of the premises, that, notwithstanding the express words of his will to *Elizabeth Bale* (one of the four trustees), *her heirs and assigns for ever*, his meaning was, that such part as should fall to the share of the said *Elizabeth* should be and remain to the said *Elizabeth* for her life, with a power to make leases for 99 years, determinable on three lives; and after her death to the plaintiff *Christopher Bale*, her son, for his life, with like power to make leases; remainder to *the heirs male of his body* lawfully to be begotten; and for default of such issue, to *Coleman and Bogan*, and their heirs, equally to be divided between them. *Christopher Bale*, the son of *Elizabeth*, was plaintiff in the cause; and the defendant, *Coleman*, insisted, that he ought only to have, by the conveyance to be executed, an estate *for life* limited to him, with remainder to his first, &c. sons, and the heirs male of the bodies of such sons successively, with remainder to the defendants *Coleman and Bogan*, and their heirs.

UPON the hearing of the cause by lord Cowper, in 1708, he was of *that* opinion; and decreed, that there should be

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a partition of the residue of the estate, and that the shares should be conveyed in this manner, viz. one fourth to the defendant Coleman, two fourths to Bogah, and the remaining fourth to Elizabeth Bale, the plaintiff's mother; that this last fourth part should be settled to the use of Elizabeth Bale for life, with the power of leasing; and after her decease, to the plaintiff Christopher, her son, for life, with the like power of leasing; and after his decease to the first and every other son of his body, and the heirs male of the body of every such son successively; and for default of such issue, to the defendants Coleman and Bogah, and their heirs, as tenants in common.

IN this decree my lord Harcourt has caused his reasons to be very minutely entered; and from these the plaintiff's counsel have argued more than from the judgment itself. The declarations are these;

HIS lordship declared, That this case, arising upon the words of a will, was much different from the several cases decreed in this court upon marriage-articles. That such articles are always intended to be carried into a further and more perfect execution: That the parties to such articles are to be considered as purchasers, and in a court of equity ought to have their contracts executed according to the intent and the nature and course of marriage-articles and settlements; on making whereof the issue male of the marriage are particularly regarded, and generally taken as purchasers: That when, by the careless penning of marriage-articles, the contract is expressed, in consideration of an intended marriage and portion, to settle the husband's estate, to the use of him and his intended wife, and the heirs male of their bodies, or the like, that general limitation has been restrained in this court, when an execution of the marriage-articles and agreement has been decreed, to an estate to the husband for life, with remainder to his first and other sons in tail male, for that it could not reasonably be supposed a valuable consideration was agreed to be

be given to have an estate so settled that the husband might destroy or bar the settlement as soon as he should make it; but that no one case had been cited where the like decree had been made upon the words of a will, under which the devisees claimed voluntarily: That in this case the question arose upon the words of the codicil; and that all wills ought to be construed according to the intent of the testator, so as such intent appears with certainty, and be consistent with the rules of law; but such intent could be no otherwise considered in a court of equity than in the courts of law, and that the same words of limitation in a will ought to receive the same construction in a court of equity as they have at law: That the same words in a will which at law would create a legal intail, ought to be so construed by this court when they fall under a trust, and *are to be carried into further execution*, as in the present case. By the words of the codicil, according to the known rule of construction of law, the testator has given the plaintiff an estate tail in Elizabeth Bale's share after her decease, and subject to her power of leasing; and that in this case it could not be inferred with any certainty from the power of leasing given by the statute 30. Hen. 8. to tenant in tail; *and it being admitted that the debts and legacies are paid, therefore the same construction ought to be made as if no trust had been*; and then, in construction of law, it will be an estate tail executed.

CONSIDER these reasons, and how far they are applicable to the present case.

THE first part of this declaration relating to the distinction between the construction of marriage-articles for valuable consideration and wills is certainly right, but has nothing to do with the present case; and it is remarkable, that the case there put is of articles limiting the estate to *the husband and wife, and the heirs male of their bodies*, which, in this court, would be decreed to be executed in strict settlement; and then it follows, *but that no case had been*

been cited where the like decrees had been made upon the words of a will. This is very true; there never was such a decree, nor ever will be, where there is no more in a will than is there stated; for in this case put, there is no insertion of trustees to preserve contingent remainders, nor any thing else to indicate an intention in the testator different from the legal force of the words.

THE next clause of the declaration seems to be applied to devises of legal estates in wills, about which there is no question but they must receive the same construction in courts of equity as in courts of law.

THE next words relate directly to the devises of trusts, and I own they go a great way? *That the same words in a will which at law would create an estate tail, ought to be construed by this court, when they fall under a trust, and are to be carried into further execution, as in this present case, so as to carry an equitable estate.* Now I must observe, that this proposition includes all trusts, as well what have been called trusts executory as trusts executed; for the words are, *which are to be carried into further execution.* I fear his lordship, for whose abilities I have the utmost deference, had not, in that case, been fully informed of the precedents; for almost every one of the authorities of this court, which I have cited under my second head, are direct contradictions to this proposition; and having already stated, I now only refer to them. At the conclusion of the general argument in this declaration, there is a very remarkable clause: *And it being admitted that the debts and legacies are paid, therefore the same construction ought to be made as if no trust had been.* His lordship has thought fit to call in this reason in aid of his opinion, but I own I cannot conceive how that subsequent fact could vary, or operate at all, in the exposition of the will: but if it could, it distinguishes that case from the case now in judgment; for here the estate is not sold, nor the trust performed, I may be thought to stand in need of some  
excuse

excuse for dwelling so long upon this case; but it has been so much enforced, and relied upon, that I thought it necessary; and I cannot help adding one circumstance within my private knowledge. After this noble lord was out of his office, I have more than once heard him express himself very strongly, and very wisely, against declaring general reasonings in decrees of this court, which possibly might affect other cases not then in judgment, and which consequently could not have been fully considered nor foreseen. I could have wished that his lordship had not departed from that cautious rule in this instance.

BUT, to add force to this precedent, it was said at the bar, that the cause was reheard again before lord Cowper, when he came to the great seal a second time, and that he was convinced by lord Harcourt's reasons, and affirmed the latter decree made for the reversal of his own. But that was a mistake, for it never was reheard again by lord Cowper; and indeed, second rehearings are contrary to the general rules of this court; and therefore, if lord Cowper ever did throw out any thing like giving way to my lord Harcourt's reasons in that decree, it must have been only *obiter*, upon the occasional mention of it in some other cause. And after all, lord Harcourt's reversal of lord Cowper's decree does not stand in need of that detail of general reasons to support it, but may be maintained upon the foot of particular distinctions from other precedents, and is most plainly distinguished from the present case.

SECONDLY, I come now to the second question arising under this head, which is founded on the difference said to have been established between *trusts executory* and *trusts executed*—That the court has a greater latitude of construction to answer the intention in the one case than in the other.

Nobody can be more averse than I am *quiescens*, to shake things settled; but I cannot find that this distinction

tion has been established by any direct resolution upon the point, though mention has been made of it *arguendo*, and reasons have sometimes been drawn from it collaterally, to strengthen decisions in cases where a conveyance has been directed by the will.

If one was to examine this distinction to the bottom, it might, perhaps, sound a little strange in the ears of lawyers, that such a distinction should be solemnly established.

ALL trusts are in the notion of law *executory*, and to be executed in this court by subpoena, as the old books speak. At common law every use was a trust. Then came 27. Hen. 8. and executed the legal estate to the use, and conjoined them together. That statute mentions *trusts* as well as *uses*; and a *trust executed* is, in strictness, now a legal estate: and therefore, in order to bring it into the jurisdiction of the chancery, it must be *executory*, i. e. the *legal estate* must want to be executed to the *trust*, and a conveyance to be decreed. Therefore, one essential part of the *trust* is, that the trustee is to convey the estate at some time or other: sometimes it is to be done sooner, sometimes later; and this, whether the testator has directed it or not; and so much every testator is presumed to know. One may, therefore, *reasonably doubt* how it can make any substantial difference, whether the testator has in words directed a conveyance or not; since the law, i. e. the course of this court, takes notice, that the testator could not intend his estate should always remain in the trustees, but that one principal confidence reposed in them is to convey.

I HAVE said, *one may reasonably doubt of this*; and I chuse not to carry it further at present, out of deference to those great men who have laid any weight on this distinction. The case wherein the most is produced on this subject, is that of lord Glenorchy v. Bosville. What my lord

lord Talbot said in his argument in that cause relative to that point, is stated to me thus :

“ THERE is another question, viz. How far, in cases of *trusts executory*, as this is, the testator's intent is to prevail over the strength and legal signification of the words? I repeat it: I think in cases of *trusts executed*, or *immediate devises*, the construction of the courts of law and equity ought to be the same; for there the testator does not suppose any other conveyance will be made: but in *executory trusts* he leaves somewhat to be done; the trusts to be executed in a more careful and accurate manner. The case of *Leonard v. Com. Suffex*, had it been by act executed, would have been an estate tail, and the restraint had been void; but being an *executory trust*, the court decreed according to the intent, as it was found expressed in the will, which must now govern our construction. And though all parties claiming under this will are volunteers, yet are they intitled to the aid of this court to direct their trustees. I have already said what I should incline to, if this was an *immediate devise*; but as it is *executory*, and that such construction may be made, as that the issue may take without any of the inconveniences, which were the foundation of the resolution in *King v. Melling's* case, and that the testator's intent is plain the issue should take, the conveyance by being in the common form, viz. to lady Glenorchy for life, remainder to her husband, the lord Glenorchy for life, remainder to the first and every other son, with a remainder to the daughters, will best serve the testator's intent.”

Nobody can possibly have a greater deference for my lord Talbot's opinion than I have; but I think his decree so right in that cause, that it did not want the aid of the distinction there made. Consider, then, how far it amounts to a positive opinion, even to conclude himself.

THE first words, indeed, as stated, are these: "I think in cases of *trusts executed* or *immediate devises*, the construction of courts of law and equity ought to be the same; for there the testator does not suppose any other conveyance will be made."

BUT I think, I have proved that the testator is, in most cases, presumed to know, that at some time or other a further conveyance must be made.

IMMEDIATELY after, his lordship mentions the case of *Leonard v. Com. Suffex*, and says, "Had that been by *not executed*, it would have been an estate tail, and the restraint had been void."

If by *not executed* is meant a deed in the testator's lifetime, which is the proper sense of the words, it is certainly right; for all such restraints of alienation are void at common law. But if it be meant only a *devise to trustees* upon an *immediate trust*, without expressly directing a conveyance, I beg leave to doubt of it; and whether if such a clause of restraint had been a devise of a *trust executed* (as it is called), the court, when it had decreed a conveyance, would not have been bound to decree it in strict settlement, as lord Cowper did in that case? He adds further: "And though all parties claiming under this will are volunteers, yet they are entitled to the aid of this court to direct their trustees." But can this differ the case of what has been called an *executory trust* from an *immediate devise in trust*? In both cases the parties are equally intitled to the aid of this court to direct their trustees in making a conveyance.

BUT towards the end it appears, that his lordship had not formed any fixed opinion to bind himself upon this point; for he says, *I have already said what I should incline to, if this was an immediate devise*. This shews it was only the present inclination of his thoughts, without having absolutely determined his judgment upon that particular point.

AND



AND indeed it appears, that he afterwards relaxed from this; for in the case of Withers v. Algood, which was decreed near two years afterwards, 4th July 1735, and has been already stated, his lordship made *the like construction* upon a trust in a deed, wherein there was no direction of a conveyance, nor any thing to distinguish it from what has been called a *trust executed*.

IN the case of Papillon v. Vojce, lord King, who was very favourable to the strict rules of law, neither founded himself upon, nor made any such distinction; for, according to 2. Will. 478. (which agrees with my memory) he says, "The diversity is, where a will passes a *legal estate*, and where it is only *executory*, and the party "must come to this court in order to have the benefit of "the will." And in the latter case, the *intention* shall take place, and not the *rules of law*. Here he explains what he means by the word *executory*, i. e. *where the party must come to this court to have the benefit of the will*; and that is the case of all trusts which must be executed by subpoena.

I HAVE now gone through the general reasoning upon the case. But there is one thing still behind which is particular to this cause, and, I really think, decisive as to the determination which ought to be made.

I LAID it down at first, and in this I entirely agreed with the master of the rolls, that nothing which has happened since the death of m<sup>r</sup>. Benjamin Ashton can vary the construction of his will, or the consequential rights of the parties; but the determination of the court must be the same as to all legal and equitable consequence, as if Benjamin Bagshaw, the devisee, had been living, and now come to this court for a decree.

THIS being an allowed and undoubted principle, I will now consider what must have been done in case Benjamin Bagshaw had, at this time, been plaintiff, and praying of the court a conveyance of this moiety of the estate upon the foot of the will. If that had been the case, the court must

must have decreed the surplus of the money arising by sale to be laid out in the purchase of lands, and one moiety of those lands to be conveyed to the use of Benjamin Bagshaw, with remainder over. Then the question would have arisen *directly*, Whether the remainder in the trustees to preserve contingent remainders, which stands in the will, should have been inserted in that conveyance, or left out? *If it ought to have been inserted*, then the next limitation of the use must have been to the first and every other son of Benjamin in tail general, with remainder to his daughters in tail, as tenants in common; for the court would not have directed a conveyance to uses to be made to Benjamin Bagshaw for life, with remainder to trustees to preserve contingent remainders during his life, and after his decease to the heirs of his body, in the very words of the will.

THIS is clear, because it would be absurd and contradictory. It would be inserting a clause in a deed to preserve contingent remainders in that deed, when there were no contingent remainders in it to be preserved. This was expressly agreed by lord King in Papillon v. Voÿce. His words were, as I took them from his mouth, "If this conveyance should be made in the words of the will, it would be a *very blundering one*, and the court will not decree that contrary to the intention of the testator. If it ought to have been left out, then the limitations of the conveyance must have been framed to the use of Benjamin Bagshaw for life, without impeachment of waste, and after his decease to the heirs of his body, with the other remainders over." According to these words, an immediate estate tail in possession would have been vested in Benjamin Bagshaw.

IN one or the other of those ways must the conveyance have been framed; for I can think of no third method. Now take it which of those ways you please, the court

must have departed from the strict words of the will, and then the question comes to this:

WHETHER the court ought to have departed from the words of the will to comply with the testator's intention, or to contradict and defeat it?

AND my opinion is, that if I am in any case obliged to depart from the strict words of a will, I am bound to do it so as to comply with and support the testator's intent, rather than to contradict and defeat it; and I hold with Lord Hale, in the case of *Pibus v. Mitford*, 1. Vent. 378. "If we can by any means serve the intent of the parties, we ought to do it as good expositors; for, as lord Hobart says, in construction (even) of deeds, judges do no harm, if they are *astuti* in serving the intent of the parties, without violating any law."

Objection.

To this it has been objected in argument at the bar, that, supposing the court at liberty to vary from the letter of the will, yet still it must adhere to that which would be the legal operation of the words of limitation of the trust, when they should be reduced into a common-law conveyance.

Answer.

I DENY this proposition; and I think I have disproved it both by reason and authorities. But, for argument sake, admitting the general proposition, the court could not have done it in the present case, by leaving out the remainder to trustees to preserve contingent uses, without conveying to Benjamin Bagshaw a different legal estate from that which the words of the will would have carried if it had been a legal devise of the lands. In *Coulson v. Coulson* the devise was of a legal estate, and the words the same as in the will; but all the judges of B. R. held, "That by reason of the remainder to the trustees to preserve contingent uses interposing between the devise to Robert Coulson for life and the subsequent limitation to the heirs of his body, Robert took an estate for life not merged by the devise to the heirs of his body, but

"by

“ by that devise an estate tail in remainder vested in the  
 “ said Robert Coulson.”

THE consequence of this opinion is, that if the court, in framing the conveyance in the case supposed of Benjamin Bagshaw being before the court, had left out the remainder to the trustees and their heirs during the life of Benjamin Bagshaw, to preserve the contingent remainders, which, in pursuing the latter method, they certainly must have done, they would have given Benjamin Bagshaw not only a different *equitable estate*, but also a different *legal estate*, from what the words, as they stand in the will, would have given him. To explain this: By the legal operation of the words of the will he would have had an estate *for life in possession*, not united with the inheritance, with a remainder to trustees and their heirs during his life, with a *remainder to himself in tail*. But by such a conveyance by deed as is contended for on the plaintiff's part, he would have had no *particular estate for life*, but an *immediate estate tail in possession*.

HENCE it clearly appears, that if, in the present case, the court had directed the conveyance to *the use of Benjamin Bagshaw for life, and after his decease to the heirs of his body*, it would not only have departed from the very words of the will, but also from the legal operation and effect of those words, and consequently have contradicted the testator's intention, according to the construction of a court of law as well as a court of equity.

BUT this I cannot think myself warranted to do; and for all these reasons my judgment is,

To reverse so much of the last decree made at the Rolls as *declares*, that Benjamin Bagshaw took an estate tail by the will of Benjamin Ashton; and as *directs*, that one moiety of the clear surplus of the purchase money be paid and applied according to the will of Benjamin Bagshaw.

AND instead thereof, as all the particular limitations in Benjamin Ashton's will are, by the events which have happened, spent and determined, I must *decree*, that one moiety of the clear surplus of the money arising by sale of the trust estate in question be paid to the defendant John Spencer, the heir at law of the testator Benjamin Ashton.

No. XVI.

CASE on the OPERATION of the STATUTE of USES, the DOCTRINE of EXECUTORY FEES, and POWERS of REVOCATION; with the OPINIONS of Mr. BOOTH, and other learned COUNSEL thereon\*.

*A.* TENANT in tail, and her husband, by articles previous to their marriage, agree to settle an estate to uses. *A.* and her husband join in making a tenant to the *præcipe*, and suffering a recovery, and declare the same to such uses as they, or the survivor of them, should by deed or will appoint. Then, in pursuance of the articles, they make a settlement, and appoint the premises to the use of the intended husband for life, remainder to his wife for life, remainder to trustees to preserve contingent remainders, remainder to the use of the articles, reserving a power to the two trustees to preserve remainders, in whom no estate was then vested but by way of remainder, to sell and convey, so as the money be laid out in the purchase of other lands to be settled to the same uses.

CAN such trustees convey a good estate in fee to a purchaser under the power, having no estate vested in them?

By the old law no fee-simple could be limited upon or after a fee-simple; but since the statute of uses, executory fees by way of use have not only been allowed, but are

Opinion of  
Booth.

\* The following elaborate opinion of Mr. Booth was first published from the original copy in Mr. Booth's hand-writing by Mr. Hilliard, in his valuable edition of *Shepherd's Touchstone*, but is here given with an additional postscript, and further opinions on the same case.

become frequent in all conveyances, operating by way of transmutation of possession; the uses are served out of the seisin of the feoffees, grantees, releasees, &c. In all future or executory uses, there is, the instant they come *in esse*, a sufficient degree of seisin supposed to be left in the feoffees, grantees, &c. to knit itself to, and support those uses; so as that it may be truly said, the feoffees or grantees stand seised to those uses; and then, by the force of the statute, the *cestuy que use* is immediately put into the actual possession. It is wholly immaterial how, or by what means, the future use comes *in esse*; whether by means of some event provided for, in case it happened, in the creation of the uses, which event may be called the act of God; or by means of some work performed by any certain person, for which provision was likewise made in the creation of the uses, which may be called the act of man: in either case the statute operates the same way; for the instant the future use comes *in esse*, either by the act of God or by the act of man, the statute executes the possession to the use, and the *cestuy que use* is deemed to have the same estate in the lands as is marked out in the use by the deed that created it. When the use arises from an event provided for by the deed, it is called a future, a contingent, an executory use: when it arises from the act of some agent or person nominated in the deed, it is called a use arising from the execution of a power. In truth, both are future or contingent uses till the act is done; and afterwards they are, by the operation of the statute, actual estates: but till done, they are in suspense; the one depending on the will of Heaven whether the event shall happen or not, the other on the will of man.

WHILST these last are in suspense, they are called *powers*. It is absolutely immaterial to the creation of the powers, whether they are reserved to the parties that created the uses, or to any one having any actual use or estate under any limitation in the deed of uses, or to the feoffees,

feoffees, grantees, or releasees, or to an absolute stranger. They all operate the same way: indeed they have different names, according as they are reserved to the persons aforesaid; and different rules are established for their interpretation, as they are of one kind or another. Some are powers appendant, some are powers in gross, some are powers collateral; but still the statute executes the possession to the use that arises on their execution, in the same manner and by the same method of operation. Sir Thomas Jones 210. How and Wingfield.

EVERY settlement made with skill for these last hundred years, can furnish something by way of example to illustrate these principles. Take a settlement made before the statute of king William III. to enable posthumous children to take as if born in the life of the father, you will find it perhaps thus: to the use of the intended husband, and his heirs, till the intended marriage; after the marriage, to the use of the said husband for life, remainder to trustees for his life to preserve contingencies; remainder to the use of such husband's first and other sons born in his life-time in tail; remainder to the intended wife *enfeinte* at his death, and her assigns, till the birth of one or more posthumous sons, and from and after the birth of any such posthumous sons, to every of them successively in tail; and for default of such issue, to the use of all and every the daughters of the husband as tenants in common in tail, with remainders over; and with powers for the husband, during his life, to make leases and powers for the guardians of the infant son, when their estates take effect in possession, in like manner to make such leases, &c.

HERE, under the limitations of these and such like settlements, you will find the uses continually to vary, and all to arise out of the seisin of the releasees: before marriage, the intended husband is seised in fee; then, upon the marriage, his estate in fee ceases, and a new use springs up, under which he is tenant for life, with the further uses



in contingency; then on the birth of a son, that son becomes tenant in tail, and also on the birth of every other son, a new use or estate in remainder springs up to every such son in tail; on the birth of a daughter, she becomes intitled, by way of use, to a remainder in tail; on the birth of another daughter, that last remainder in tail ceases, and both daughters become intitled, by way of use, to a tenancy in common in remainder in tail; then if the husband dies leaving a child in *ventre matris*, a use vests in the mother till the birth of that child; and then that use de vests, and the same event carries an estate tail to that child. So where the father makes a lease under his power, a use vests in the lessee for such estate as the lease gives, and such lessee's use or estate takes place before and settles itself over all the uses: it is the same as a lease made by a guardian to any of the infant children (which guardian is a perfect stranger to the parties at the time of the original settlement); there the use or estate given by the lease made under the power over-reaches all the other uses, and takes place before them; and this is done by the operation of the statute, just in the same way as any other use would arise, under any of the limitations contained in the settlement.

Fcoffment to *A.* and his heirs, and if *B.* pays 100*l.* to *J. S.* then to the use of *B.* and his heirs: here on the payment of the money the estate of *A.* ceases, and the use executes in *B.* and his heirs. This case is cited in many books; and the case of *Lloyd and Carew*, in Sh. P. C. 137, 138. is to the same effect.

*A.* levies a fine of the manors of *D.* and *S.* and declares the use by deed, as to the manor of *D.* to the use of *B.* and his heirs; and as to the manor of *S.* to the use of *B.* and his heirs, till *B.* or his heirs are evicted by the wife of *A.* of the said manor of *D.* and after such eviction, to the use of *B.* and his heirs: this is a contingent use of the manor of *S.* so that a use will vest in *B.* whenever any  
eviction

eviction happens, and then the use in *A.* ceases. 2. Roll. Abr. 792. In settlements on younger sons of peers, or of dignified persons, there are frequently provisions, that if such a dignity, or such a family estate, depends on them, then the use to them to cease as if they were dead without issue, and then the premises to go over to the next in remainder: this is an actual revocation when the contingency happens.

It remains only to shew, that not only the happening of an event by the act of God, but also the performance of any particular act by a stranger, will devert an old use, and give birth to and establish a new one.

Now, powers of revocation do, in their execution, operate this way; and do devert or repeal and determine the old uses, and set up and establish new ones. The execution of these new uses is, by force of the statute, just as the execution of contingent or future uses. The books say, that when a power is executed it becomes a limitation; but as these powers of revocation are, in fact, generally reserved to the grantors as first owners of the estate, it may be proper to shew that the books make no distinction, but allow all kinds of powers to be limited to strangers; and nothing suits this purpose better than to cite the words of lord Hale, in the case of Edwards and Slater in Hardres 410. 415. Powers to raise estates are either *simply collateral*, as where a party that hath such powers has not even had any estate in the land; as where such power is reserved to a stranger, and there it cannot be destroyed by such stranger, because it is but a bare nomination; or *not simply collateral*, which are of several sorts, not material to this purpose.

HERE you see lord Hale takes it for granted, that a power to raise uses may be reserved or limited to a perfect stranger.

LORD COKE's opinion in Co. Lit. 237. is the same. He tells you, that powers in voluntary settlements are  
founded

founded on the statute which executes them as uses, then he explains the *nature of powers of revocation of uses*, and what consequences are incident thereto, as that they may be released or extinguished when reserved to the original grantor, or to any one claiming any estate or interest in the deed; but he saith, if he that hath power of revocation, *hath no present interest in the land, nor by the cessor of the estate shall have nothing*, then his feoffment, fine, &c. of the land is no extinguishment of his power, because it is merely *collateral to the land*. 'If a power to revoke uses may be reserved to a stranger, a power to raise or appoint future uses for a particular purpose, may surely be reserved to a stranger too.

THE reserving of powers of revocation to the grantors or original owners of the land, though checked by requiring the consent of the trustees, hath of late been disused in settlements, because doubts have arisen, whether such settlements are not fraudulent within the statute of 27. Eliz. See Sir Thomas Jones 94, 95. Buller and Waterhouse.

POWERS to enable grantors or owners to revoke, or to sell or convey in exchange, *first settling other lands of equal value to the same uses*, have been found inconvenient; because, though it may be easy to sell an estate; and lay out the money in the purchase of a new one, yet it is by no means easy to settle a new estate before you have sold the old one. Few people are in circumstances to buy new estates till they have sold their old ones.

BUT the vesting a power in the releasees (who themselves have a *scintilla juris* to serve and feed the uses when they arise) to sell and convey; and adding, *that when they receive the purchase-money, and sign a receipt for the same under their hands, the releasees shall stand seised, and the conveyances shall enure to the use of the purchasers in fee*, with proper trusts concerning the laying out the purchase-money; this answers every purpose. I found this me-

thod used and practised by mr. Ward and others long before my being in business, and I always use this method to this day.

*Lincoln's-Inn, 23d June, 1761.*

J. BOOTH.

P. S. Powers under wills are not like powers under conveyances, operating by way of use. The execution of a power under a devise, is not the limitation of an use; no, not when the devise is to uses. As, where there is a devise to J. S. and his heirs to the use of A. for life, remainder to B., in tail, with power for A. to limit a jointure, or lease, or charge; here there will be no feisin in J. S. consequently no such use in A. and B. as is executed by the statute of uses; consequently, the execution of the power is no use, it operates as a devise under the Statute of Wills\*.

J. B.

*Mr. Filmer's Opinion.*

THOUGH the power given to the trustees in this case is not appendant to any estates in the land, yet I apprehend such collateral power will enable them to convey a good estate in fee-simple to a purchaser; and though it be not expressly mentioned in the power that the uses of the settlement shall cease, yet it being declared by the parties to the settlement, that after such conveyance the land shall be to the use of the purchaser discharged of the uses in the settlement, they must necessarily cease, I think, as fully and effectually as if it had been so expressed in the power; and I think there is no doubt but the uses of a set-

Opinion of  
Filmer.

It is remarkable that this Postscript is not affixed to the original Opinion in the hands of the Editor of The Touchstone, but is found added to different copies of it in the hands of several eminent Conveyancers, and was first given to the public by Mr. Butler in his note on Coke Littleton,

tlement may, by agreement of the parties, be made to cease, and enure to another in a reasonable time. See Show. Parl. Cases 137.

June 26, 1761.

BEV. FILMER.

*Mr. Banks in Answer to the above Opinions.*

Opinion of Mr.  
Banks.

Show. P.C. 137.

Fq. Caf. Abr.

260.

Proc. in Ch. 126.

IT may be observed, that the laws of executory devises, and future and springing uses, are now well known and established. In Montague's case, 6. Co. Rep. among other cases, it is well known and settled, that every use ought to be raised by covenant out of the estate of the covenantor, or by feoffment, fine, &c. (by transmutation of possession) out of the estate of the feoffees and conusees, &c.; and that a contingent fee-simple may arise out of the first fee, where the contingency is to happen within one or more life or lives in being, is not to be doubted. It is so settled in Lloyd v. Carew, but it is not the present case. It is also well known, that where the use comes in esse either by the act of God, i. e. by death of the parties, or by act of man, the statute operates, and unites the estate and possession to the use, unless the act of man is such as is not warranted by law, as being too remote. It is also well known and established, that powers, when good in their creation, given to carve out particular estates and interests, take place of all uses executed, and operate by way of infection or ingraftment upon the original estate of the feoffee, grantee, &c. but do not otherwise affect, abridge, or destroy the uses created in remainder: they all, subject to the particular estates so carved out, stand good as in their original creation, until revoked or declared to cease by virtue of some power reserved for that purpose, except in the case of a contingent fee-simple, to arise out of a reversion in fee-simple; but in that case there is always a declaration that the reversion in fee shall cease, and the premises remain to the party who is to take the new-executed use upon the contingency happening, as may be seen in the

the case of Lloyd and Carew, and many others. With respect to the several cases put upon the statute of 10. and 11. king William, I think they are right; and had the practice continued to this day, it would have preserved the estates of many children who have been defeated of their rights, contrary to the words of the statute; which is clearly intended to preserve the rights of sons born in the life of the father, although a recovery were suffered before their birth, as if they had been posthumous children; but no case has yet happened to try this question, being *casus omisus* out of the statute: but these cases go no further than to shew that an use might be limited to one in fee, or for life, upon a contingency which might or might not happen in a short time, or within the compass of a life, and therefore good, as in all cases of settlements, when the fee is limited to the grantor and his heirs until marriage; and after marriage, then to other uses which take effect immediately; but there no prior uses are created and lasting, as in this case. The case put, of contingent remainders to sons, is clear, and goes upon different principles than the present case; but the case put, of a daughter being raised in tail, and on the birth of another daughter the remainder to the first daughter in tail ceases, I cannot admit; for the after-born daughter comes in as a joint tenant, not by of the estate in a moiety, but by prior title out of the seisin of her sister, as she would have done in the case of coheirs by descent: the first, who had received the profits of the whole estate, would have no right to retain them to her own use against the after-born sister, as in all cases when lands descend to the present heir until a nearer heir be born, as was determined by lord Hardwicke, lord ch. justice Lee, and mr. justice in the house of lords 1752. 1. Co. 95. 3. Co. 61. 11. Co. 80. and the act of parliament 1752. viz. 25. Geo. 2. c. 39. for explaining the act 11. and 12. W. 3. c. 6. As to powers of revocation to strangers, it is too clear to admit

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of any argument; nor is it now conceived to be necessary, as in this case there is no power of revocation at all: it is the want of such a power that creates the doubt. And as to the powers to enable grantors or owners to revoke, or to sell, or to convey in exchange, first settling any other lands to the same uses, they are clearly wrong, because this is a condition precedent, and I cannot say I ever saw such a power. The powers I have seen generally run otherwise, and are clearly adapted to prevent that inconvenience \* \* \* \* \*

They are to join in a partition, and to that end to revoke and limit such new uses as shall be proper for effecting the partition, so as the premises to be allotted on such partition be settled to the former uses. The power to enable the trustees to sell are, first to revoke the uses and limit the same to themselves in fee, in trust to sell and lay out the money arising from the sale in the purchase of other lands, to be settled to the uses of the land revoked: so of powers to exchange, which are not attended with any of the inconveniences before suggested. Having therefore gone through all the reasons made use of in support of the power, it becomes necessary for me, if possible, to shew, that the power is ineffectual for want of a power of revocation in the trustees, or declaration in the original power, that the uses executed shall cease before the new use can arise out of the estate of the recoverer to the purchaser in fee, being to take effect not as a fee-simple out of a fee-simple upon a contingency which must happen in a reasonable time, but after a general failure of issue: and in support of this opinion I will consider the operation of the recovery. The recoverer is in possession of the estate which he gained under the tenant in tail; and as an estate tail in supposition of law may continue for ever, so every recoverer recovers a fee, out of which fee are carved the particular uses and estates limited by the settlement, and somewhat more. Every charge, lease, or interest, derived

out

out of the estate of tenant in tail before recovery suffered, shall, after the recovery had, take place of the new-created uses, and continue so long as the recovery doth remain in force. A power then is given to trustees to sell, and after such sale the recoverer shall stand seised to the use of the purchaser in fee, subject to all uses whatsoever created out of the estate tail, for the subsequent declaration cannot reach it. Consider it then as a power to raise a fee out of a fee upon a contingency, is there any contingency here to happen before the fee can arise, but that of failure of issue? How can it arise when the whole fee-simple in the recoveror is limited to particular uses now existing, or to uses which might exist, arising out of the estate tail, without an absolute revocation of the uses? If not, then it brings it to the simple question on which the doubt arises; that is, Whether the vested uses arising out of the estate of the recoveror may determine by implication of law necessarily operating on the intent of the parties? It is said by Mr. Tilmer, that though it be not expressly mentioned in the power that the uses of the settlement shall cease, yet it being declared by the parties to the settlement, that after such conveyance the land shall be to the use of the purchaser, discharged of the uses in the settlement, they must necessarily cease as fully and effectually as if it had been expressed in the power; and he thinks there is no doubt but the uses of a settlement may, by agreement of the parties, be made to cease, and enure to another in a reasonable time; and quotes, as an authority, the case I have mentioned before of Lloyd and Carew, in Show. Parl. Rep. 137. To this opinion, as well as that of Mr. Booth, I pay the utmost deference, and should be ashamed to set up my weak opinion against them, if I did not think that the cases on which they ground their opinions are not sufficient authorities. The case of Lloyd and Carew is clearly a condition annexed to a fee arising out of a fee to take effect after the death of the survivor



vivor of two tenants for life, there being then no issue living, which was deemed a reasonable time for a springing use to arise, but there is an express declaration that the first use should cease. And in the case of *Davis v. Speed*, in the same book, determined also in the house of lords, there a distinction upon the intention of the parties is taken betwixt a will and a deed executed in the life of the parties. In that of a will, large allowances are often made in favour of supposed intentions; but the rules of law are always allowed to govern in the construction of deeds, and that against a purchaser who had been 30 years in possession; and in that case it was said, that as to the notion of a springing contingent use, it is hardly intelligible in itself; it is to empower them to suppose intentions, where none are expressed, and to raise uses by implication which never were designed, &c. If this be so, I think I am right in my opinion, that this power is not good in its creation; but yet I think, if what is said in the case of *Fitzgerald v. Fauconberg*, in the house of lords, in 1730 (which must be long since the determination of the above cases), be right, i. e. *That a conveyance to different uses by a stranger, in virtue of his power, would be as effectual a revocation as if expressly made*, then I shall readily submit to concur in opinion with mr. Mlaier and mr. Booth, that the power is well created.

That it is so.

*V. L. Jones*, 522.

393.

*g. Cro.* 472.

*10. Co.* 144.

## No. XVII.

SELECT CASES, *determined in CHANCERY by*  
LORD HARDWICKE, *on the STATUTE OF*  
MORTMAIN\*.ATTORNEY GENERAL *v.* LORD WEYMOUTH, *and Others.*

No. 1.

LINCOLN'S-  
INN-HALL,  
HIL. TERM,  
16. GEO. 2. 1743.

SIR JOHN JAMES, late of Saint Edmundsbury, bart. by his last will, dated 15th May 1740, devised to Richard Dalton, James Calthorp, and Joshua Grigby (the executors of his will), their heirs and assigns, for the use of them, their heirs and assigns, all and every the manors, messuages, lands, tenements, and hereditaments, both freehold and copyhold, and all his real estates whatsoever, in trust to sell and dispose thereof as soon as conveniently might be after his decease, and to pay all the monies to arise by sale thereof, and the rents, issues and profits in the mean time, and until such sale (all necessary charges deducted), unto such person or persons, and for such uses, intents and purposes as he had thereafter given the same. And then he bequeathed 4000*l.* to his late brother's widow, Elizabeth James, and 4000*l.* to the said James Calthorpe, and to the said Joshua Grigby and one Orbell Ray; 1000*l.* to be laid out by them as a fund for certain charitable uses, which he forbore to mention because they knew his designs as to charities; and likewise 2000*l.* to Joshua Grigby for his care and trouble. And then he declared his mind to be, that his debts, funeral expences, and legacies by his said will given and bequeathed, should be paid and satisfied by and out of his personal

Devise of land to be sold, and the residue of the money, after payment of debts, &c. to charity. The devise held to be void by the statute of mortmain. *Ambl. 20.*

\* The cases here reported form a series of the principal authorities on the subject subsequent to the statute of 9. Geo. 2. called the Statute of Mortmain.

estate, if the same should be sufficient for that purpose; but if the same should fall short, then he further declared, that such deficiency should be made good by and out of the monies to arise from the sale of his real estate, or of the rents and profits in the mean time: and subject to the payment of his said debts, legacies, and funeral expences, he gave and bequeathed all the monies to arise by sale of his real estate, and by the rents and profits thereof in the mean time, and until such sale, and also all his personal estate, unto the said Richard Dalton, James Galthorpe, and Joshua Grigby, his said executors, in trust to pay over one equal moiety thereof to the governess of the hospital of Bethlem in London, for the benefit, use, and support of incurable lunacies; and upon trust to pay over the other moiety thereof to the treasurer for the time being of a society who call themselves the governors of Saint George's hospital near Hyde Park Corner, to be applied towards carrying on the designs of the said hospital.

AND thereupon the attorney general, at the relation of the said hospital, filed an information against the said trustees under the said will, and against lord Weymouth and several other persons, who claimed as heirs at law to the said testator, and some of whom had taken possession of his real estate, praying, that the testator's estate might be sold, and the money arising by such sale, and also all monies received or to be received for messe profits until such sale, might be applied for the uses intents and purposes directed and appointed by the said will, and to supply the defect of a surrender of a copyhold estate to the use of the will in favour of the said charities; or that the whole real estate of the testator might be so marshalled, and such directions given, as would best answer the charitable purposes of the testator.

THE defendant, lord Weymouth, as to so much of the said information as prays that the monies arising by sale of such part of the real estate of the said sir John James as came to the said John James by purchase, or which descend-

ted to him on the part of his mother, and that the monies which have arisen or been received, or till such sale shall be had may arise and be received, by the rents and profits thereof, may be applied to and for the charitable uses intents and purposes in the will of the said sir John James directed and appointed, pleads the statute made in the 9th year of his present majesty, entitled, "An Act to restrain the Disposition of Lands, whereby the same become unalienable;" and by his answer sets out his title to the premises as heir to the testator on the part of his mother, on a supposition that sir John James died without heirs on the part of his father.

ON arguing this plea at Lincoln's-Inn Hall, the attorney general, &c. on the part of the information, pressed that the plea might stand for an answer, alledging that they were not sufficiently prepared on a point of such importance; but the chancellor being unwilling, they were obliged to argue it.

*Lord Hardwicke, Chancellor.*

I SHOULD be very glad, if there was any doubt in this case, to let the plea stand for an answer, with liberty to except, &c.; but where the court has no doubt, it is not for their credit to let the parties proceed; and to suppose that I have any doubt concerning it, may encourage persons to try the experiment of leaving their lands to charities in this manner, when there is a certain way of doing it pointed out by the act of parliament.

AN objection has first been made to this plea, because the defendants have not sufficiently shewn themselves to be heirs at law, to whom this estate can descend. But I am of opinion that this is not material upon this plea, the defendants being in possession; and were they strangers in possession, they need not have shewn a title in themselves, but a want of title in the relators, and have pleaded this act of parliament by way of bar. Upon the merits there

are two general considerations: First, What is the true construction of this act of parliament? Secondly, What is the effect of this will?

IT is insisted that the true intention of the act was, according to its title, to restrain the disposition of lands whereby they become unalienable; and this was the only intention of the act.

BUT I think the intent of the act is taken up much too short; for the title is no part of the act, and has often been determined not to be so; nor ought it to be taken into consideration in the construction of this act; for, originally, there were no titles to the acts, but only a petition and the king's answer; and the judges thereupon drew up the act into form, and then added the title; and the title does not pass the same forms as the rest of the act, only the speaker, after the act is passed, mentions the title, and puts the question upon it; therefore the meaning of this act is not to be inferred from the title, but we must consider the act itself. It first takes notice that gifts and alienations of lands in mortmain are prohibited by divers wholesome laws, as prejudicial to the common utility; and then it proceeds, that nevertheless this public mischief has greatly encreased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called (charitable), to take place after their deaths, to the disherison of their lawful heirs. The reason of this statute was to hinder gifts by dying persons out of a pretended or mistaken notion of religion, as thinking it might be for the benefit of their souls to give their lands to charities, which they paid no regard to in their life-time; and therefore the act of parliament has not absolutely prohibited the disposition of land to charitable uses, but left it to be done by deed executed a year before the death of the grantor, and enrolled within six months after execution; though this will render them equally unalienable: but the legislature blended the two inconveniencies together, the act

act of languishing and dying persons, and the disherison of heirs.

THIS being the general intention of the act, What is the provision of it? That from and after the 24th of June 1736, no manors, lands, tenements, &c. nor any personal estate to be laid out in the purchase of lands, shall be given, granted, aliened, limited, released, assigned, and transferred or appointed, or any ways conveyed or settled upon any person for any estate or interest, or any ways charged or incumbered, &c. in trust for the benefit of any charitable uses whatsoever.

THESE words import, first, that it shall not be in the power of any person to convey the lands themselves; secondly, that it shall not be in their power to charge or incumber them.

AND therefore it must be agreed, that no man can charge 1000*l.* 500*l.* or even 100*l.* on any lands of ever so great value to any charitable use whatsoever. And the present case is stronger, as it gives the whole residue, after payment of particular legacies, &c. to a charitable use: not only the gifts of lands themselves is made void by the act, but even any charge out of them. Then consider the second question, what is done by this will, and I am of opinion that it is both a devise of the land itself, and a gift of the money arising by the sale of the land after payment of particular charges contrary to the prohibition of the act. First, it is a gift of the rents and profits till a sale; and how long it will be before a sale, till what time it will be postponed, nobody knows: no man has a right to compel the trustees to sell, if they pay the debts and legacies, but the charity; and it being a devise of the rents and profits, it is a devise of the lands themselves. Then, as to the devise of the money arising from the sale, I do not think it necessary, in order to determine this question, to say, whether it is to be considered as a devise of the land or money; but if the act of parliament did not stand in

the way, the person intitled to the residue might come and pray to have the land in this court instead of the money, and might have retained it as land; and the rather, as the testator has given the profits till sale, so that he has made them owners of the equity of the estates; and therefore this is as strong a case as that of Roper and Ratcliffe: but I will not depend upon that case, because I am of opinion, that whether this surplus is to be taken as money or land, it is just the same thing, and that the act of parliament is stronger than that of 11. and 12. William 3. against Papists, for their disability was upon the person taking; and it was said on his behalf, that when he came to take he would have it as money, and the act of parliament has created no disability to take money. But here the disability is laid on the person devising. The prohibition is, that no manors, &c. shall be given, &c. by any manner of words, or any ways charged or incumbered by any person whatsoever, and the subsequent clause makes void all charges and incumbrances for the benefit of a charity.

THEREFORE, if sir John Janties, instead of devising the surplus, had said, "I charge my real estate with the payment of 1000*l.* to a charity," it would certainly have been void by the express words of this act; and will it not then be extremely absurd to say, he shall be able to give his whole real estate to be turned into money for the benefit of a charity?

It is impossible, in my opinion, to say that such a devise as this can be maintained; and therefore I think it would be very wrong to let the plea stand for an answer, which might lead the parties into further expence, and induce people to devise their lands in this manner.

5th Feb. 1745.

PLEA ALLOWED\*.

\* On the hearing of this cause, LORD HARDWICKE established the will, and directed the trusts to be performed, except as to the devise of the surplus of the real estate to charities, &c. See *Ambler's Rep.* 25.

SORESBY AND HOLLINS.

No. 2.

JOHN NAYLOR in 1738, after the statute of mortmain, made his will in these words: "I will and desire that my executors, within twelve months after my decease, do settle and secure by purchase of lands of inheritance, or otherwise, as they shall be advised, out of my personal estate, one annuity or yearly payment of 50 l. to be paid yearly and distributed for ever by my executors, their heirs and assigns, among the poor and indigent people of Leek, in the county of Stafford, in such manner as they shall think fit; and my will also is, that my executors do also settle and secure one other annuity of 5 l. to be paid yearly to the vicar of Leek for the time being for ever for preaching an annual sermon on every 12th day of October:" and the testator devised the residue of his personal estate to be equally divided between his sisters Mrs. Soresby and Mrs. Hollins.

LINCOLN'S-  
INN-HALL,  
6th AUG 1740.  
A bequest to charitable uses secured by the purchase of lands of inheritance, or otherwise, is a good bequest, notwithstanding the statute of mortmain. Stat. 9. Geo. 2.

*Lord Hardwicke, Chancellor.*

THE only question is, Whether the devise of the two annuities to charitable uses is void by the late act of parliament?

It is insisted they are void, because the direction of the devise is to settle and secure the annuity of 50 l. by a trust of lands of inheritance; and though the words "or otherwise" are added, they will not vary the case; for the testator's intention was to assure the annuity out of lands of inheritance: but I am of opinion upon this act of parliament, that the devise is not void, and that there is no authority to construe it to be void by law, if it can possibly be made good. The act is not aimed at perpetual charities, merely as such, or to prevent the establishment or creation of them, but was designed against perpetual charities in land, and, as the title imports, to restrain the disposition of lands whereby they become unalienable: The



whole recital and enacting part of the statute take notice only of the unalienable disposal of land whereby heirs are disinherited, and therefore the alienation or conveyance of lands to such purposes are prohibited; and there is a clause to prohibit money being laid out in land to such purposes as would make them unalienable; yet there is no restriction whatever upon any one leaving a sum of money by will, or other personal estate, to charitable uses, provided it be to be continued as personality, and the executors or trustees are not obliged, or under a necessity of laying it out in land by virtue of any direction of the testator for that purpose. Consider then, whether this clause and devise in the will fall within the restraint and prohibition of the statute. By the first words they fall within them; for the testator directs they shall settle and assure by purchase of lands of manurance, &c.; and if he had rested upon those words, the devise had been clearly void; but then he goes on in the disjunctive, "*or otherwise*," as my executors "shall be advised." If a devise in a will is in the disjunctive, and leave to the executors two methods to do a particular thing, that one lawful and the other prohibited by law, can any court say, because one method is unlawful, that therefore the other is so too, and the whole bequest void? No: for if one of them is lawful, that shall be pursued and take effect. It has been further argued against the devise, that the words *for ever* they the annuity must arise out of some real estate, which only is capable of supplying them for ever; for personal funds are too perishing and transitory in their nature to answer such everlasting annuities. And suppose a particular sum was vested in stock, with design to purchase a particular yearly sum or annuity, it may so happen that the Company may be quite dissolved, or that stock may fall, or interest be so reduced, that half the annuity may not be produced. But these objections may be over-ruled; for if the Company should be dissolved, the principal money may be taken out and invested in some other

other Company. And there may be annuities that may probably continue for ever, and not payable out of land. I will mention one which has lasted a century and an half, and may exist perpetually; that is, sir Thomas White's charity, being a disposition of money to be employed in continual rotation in loans to poor tradesmen of several sums to be lent out for a stated number of years, and then to be paid; and any man may, at this day, give by will a perpetual charity in this manner; but if he by will secures such loans by lands, or purchase of lands, his devise will be void, and contrary to the late statute of mortmain. If this case had been to be considered by the court before the late statute, it would, as the best method to secure the annuity for ever, have recommended and directed a purchase of lands; but when this court is precluded from doing it in this manner, if it can be obtained in any other, there is no reason to say the devise is void.

It is said, the words "heirs and assigns" import a purchase of lands, or some real thing, for no personal estate can descend to heirs; and if the money is to be invested in personal security, it will not go to the heirs but to the executors, and so the intention of the testator not pursued. I will suppose that an obligor binds himself, his heirs, executors and administrators in a sum of money to a Papist, who obtains judgment on the bond, and takes out an *elegit*. In such case I think it has been held at the assizes, or at least it might very well have been so held, that the Papist cannot maintain an ejectment; and yet the bond is good to bind the person of the obligor and his personal representatives, but not to charge his lands, or his heirs, who represent him in his landed capacity: and this comes up to the present case, which would secure the charity in a double sense, either upon land or personalty, if the law would allow both; and if the law prohibits one only, it certainly allows the other. I am of opinion upon the whole, there is nothing that makes this bequest void in every part, but that

it

it is good in that way which the law does not forbid, But I would not have it questioned, that if a man should, by his will, direct a sum of money to be laid out in land, or upon rent-charge to be secured on land, for any charity, and in the mean time till it can be so laid out, to be invested in government securities for the benefit of the charity, but that is a void bequest, because the final end and intention of such testator was to dispose of his money in land; and the investing it in government securities was only to secure it till a purchase of land or rent-charge happened.

As to the annuity of 5*l.* there are fewer objections to that than to the other; for there are no directions at all for any money, or personal estate, to be laid out in land; the executors are only willed to secure and settle 5*l.* a year; and it must be secured on a personal fund, consistent with the will and intention of the testator, and contradictory to the words of the act of parliament; and as it is often said in the old books by the judges, "I was by at the making of the act of parliament, and the meaning and intention was when to be so and so;" I was by at the making this statute, and it was said at that very time by the legislature, that it would not hinder any disposition of the personal estate.

DECREE. The devise good, and the money to be invested in South Sea stock for the purposes in the will.

No. 3.

MOG V. PRESIDENT, &c. OF BATH HOSPITAL.

IN CHANCERY,  
16th Nov. 1750.

Assets not marshalled to support a legacy contrary to law, viz. lands to a charity. 2. Vez.  
52.

DOROTHY CHURCHEY, by will of 6th April 1748, gave to several persons therein named 500*l.* in trust, to be by them laid out in land for the uses following: that is, 10*l.* a year to be paid to the vicar of Chewton for performing divine service in the parish of Farringdon once every Sunday in the year; the residue to a school-master for teaching children to read, &c.; and after other devises to charities, devised all her real estate whatsoever in Wincanton, in Mapperton, to her executors in trust,

at the end of five years after her decease to sell the same, and to apply the money arising from such sale, and the rents in the mean time, to the uses in the will; and directed the costs of a suit in chancery, in which she was engaged, to be paid out of the real estate, and subjected her personal estate to the payment of her debts and legacies; and after some pecuniary legacies declares her will and desire is, that all the residue of her personal estate, and arising by sale of her real estate, over and besides payment of her debts and legacies, should be disposed of and distributed to such charitable uses as her executors should think fit, desiring them to have regard to the Infirmary at Bath, for the disposition of some part thereof as they in their discretion should think fit.

BILL by heir at law, that the several devises to the charities may be declared void, and that the monies may be laid out in land for his benefit. ~

MR. NOEL, WILBRAHAM and SAYFR *for the Plaintiff.*

THE three legacies of 500*l.* 50*l.* and 50*l.* devised to be laid out in land for charities, are within the statute of mortmain, and void; but the court will so far carry into execution the intent of the testator, and order the money to be laid out in land for the benefit of the heir at law.

2d. THAT the devise of the residue to charities, regard being had to Bath Infirmary—as that money will be raised by the sale of lands, the devise is void, being an interest arising out of land; and the case of the attorney general and lord Weymouth, 5th Feb. 1745, was cited, that the devise of the residue of money to be raised out of land, being to a charity, is within the statute of mortmain.

3d. Q. THAT the Bath hospital was not empowered to take otherwise than according to the statute of mortmain, either in express words or tantamount, in the act of parliament that incorporated them, 12. Geo. 2.

4th:

## CASES ON THE STATUTE OF MORTMAIN.

4th. THAT the court will not marshal the assets, and lay the charge of the debts and legacies on the real estate, and disencumber the personal, so that the will may take effect with regard to the charity to Bath hospital.

LORD CHANCELLOR broke in and said, in the case of the Attorney and Weymouth, he was of opinion he ought not to marshal the assets in order to evade the statute of mortmain.

MR. ATTORNEY-GENERAL, Mr. SOLICITOR-GENERAL, and SEWELL on the other side, admitted the devise of the 500*l.* 50*l.* and 50*l.* to be laid out in land, &c. as void; but the heir at law shall not be intitled to have a decree for the purchase of lands with these sums.

LORD CHANCELLOR. If money be directed to be laid out in land for a charity, the court will not declare it void as to the charity and good as to the purchase of the land, but the devise is totally void, and the same as if it had not been inserted in the will; otherwise it would be to act directly contrary to the intention.

To 2d. Q. Nothing particular is given to Bath hospital, but it is left to the discretion of the executors. It was intended a legacy out of money only; a compound fund; not a permanent charity to be given to particular objects, and may be all spent the next day; therefore not within the 9th Geo. 2. statute of mortmain.

THE land is directed to be sold within a limited time, without regard to the charities. The costs of suit in chancery are expressly directed to be paid out of the money arising by the sale of the land.

3d. Q. THE statute of incorporation enables them to take this money, and is, in this respect, an exception or repeal of the statute of mortmain, not by express words, but by words that are tantamount; they are declared capable of taking all sums of money whatsoever, which must mean even monies to be raised out of land. Besides, they are enabled to take monies by will devised to charitable uses; which,

Attorney-general,  
Solicitor-general,  
and Sewell.

which words are very particular, and not generally inserted in charters by the king.

To 4th Q. it was argued, that the court will marshal assets not only for debts but also for legacies.

THE testator's intention shall prevail as far as it can. If money is directed to a good use, or to a bad one, the court will order it to a good one: as if money is devised to be laid out in the funds, or in land, for a charity, as it cannot by law be laid out in the last, and the devise take place, it shall be ordered to be laid out in the funds. *SORESBY and HOLLINGS*, and several other cases, are to that purpose. If the debts are directed in the present case to be paid out of the real assets, the intention of the testatrix may be complied with throughout, and the devise to Bath hospital take effect.

IN the case of the Attorney-general and lord Weymouth, the court marshalled for the sake of a charitable legacy of 1000*l*.

*Lord Hardwicke, Chancellor.*

SINCE the statute of mortmain, 9. Geo. 1. I have endeavoured to give charitable legacies effect as far as I can; but I cannot set up new rules to avoid that statute.

SEVERAL questions have been made, some of which are very plain.

1st. As to the three legacies of 500*l*. 50*l*. and 50*l*. they are admitted to be void; but then it is insisted the money ought to be laid out in land, and go to the heir at law. But the court has no power to make a resulting trust for his benefit, and create a realty which was not so before—the property remains of the same quality as before.

2d. *Quere*. As to the *residuum*, it is not controverted by plaintiff that the residue of the personal belongs to the charity; nor, on the other hand, can there be any pretence to say, the residue of the money arising by sale of the  
realty

realty does belong to it; there is no doubt of it, since the case of *ROPER and RATCLIFFE* in the house of lords.

3d. Q. THE money arising, &c. being to be considered as real estate, it is insisted Bath hospital, by the statute that incorporated them, is enabled to take this money, though considered as real estate by virtue of the words "all sums of money." If that was so, I should doubt if it would support this devise, because it is not a direct devise but a recommendation only. But saying that out of the way, and suppose it a devise of all the residue of the real and personal estate, I am of opinion this hospital is in the same condition as other charities. There are many powers in the statute that incorporated them which could not have been given by charter from the king, which might be the reason of their incorporation being by act of parliament. Now, it would be going great length to say, when the legislature gives a charter with more powers than the king could, that the construction on those clauses should be different from what it would be in a charter. Statute 9. Geo. 2. is a general law, and subsequent charters must be subject to that general law. "All monies whatsoever" must mean such as are given according to the general rules of law. The other clause is only to enable them to take without licence, which they could not otherwise; but then the devises must be according to law.

4th Q. WHETHER the money arising out of the residue of the real and personal estate shall be so marshalled, that the intention of the testator with respect to the charity shall have effect, which must be by laying the debts and legacies on the real estate, and all the personal be applied to the charities; but I am not warranted to do that by the rules of law and equity.

WHAT is the ground of marshalling assets? The personal estate is the proper fund for payment of debts; and therefore, if the heir at law is sued at law upon a specialty (which

(which he may be), he may come into this court and be reimbursed out of the personalty: what reason is there to turn this rule quite the contrary way in this case?

It is said, Because the residue both of the real and personal estate is given to the charity, and unless this method be taken the will cannot have effect. What is the will? It is an illegal disposition to charity. Am I to set up a compensation for that? It is a devise of all the residue of the personal estate. What is that residue? That which is left after payment of debts and legacies. Shall I throw all the debts and legacies on the realty, that the charity may take the residue of the personalty? In the case of the Attorney-general and Weymouth, I went as far as I could to assist the charity: the real estate was there made subject to debts and legacies, as an auxiliary fund to the personal. The personal is the natural fund, and the legacy of 1000*l.* there was to a charity. On that ground I thought the legacy good, and ought to be paid out of the personal estate. Where the court marshals, as in the case I put of an heir, he stands in the place of creditor. Shall I say the devise here of the real estate is void, and yet the charity shall stand in the place of the devisee, and have relief out of the personal estate? Besides, there are express words that direct the debts and legacies to be paid out of the personal estate, and only a residue to be given to the charity. My opinion was, it could not be done in the Attorney-general and Weymouth, for *there* the personal estate was first liable to debts and legacies: so it is *here*. If I was to marshal the assets, it would be to set up a new rule, and to act contrary to the express words of the testator. If there should be any surplus of the personal estate after debts and legacies paid, the charity will be intitled to it. Therefore decree, &c.



No. 4.

GRAYSON *against* ATKINSON \*, 7th Nov. 1752.

THERE was a doubt on a clause in the testator's will, whether it was within the statute of mortmain. The testator gave 40 l. to be applied towards procuring queen Anne's bounty; and till that could be obtained, the interest of the same was to go towards augmenting the curate's salary.

QUIRE. As the rule of the commissioners of the bounty is, if anybody will give 200 l. they will add 200 l. more, the whole to be laid out in land, whether this bequest, according to that rule, is not within the statute of mortmain?

LORD CHANCELLOR enquired of Montagu, master in chancery (who is secretary to the commissioners), what is the rule; who said, it is as above, and passed under the great seal; but there is also another rule, or by-law, viz. that the donations of testators should have effect.

His lordship thought it hard to extend the statute of mortmain to this case; and as the testator has not expressly directed the 40 l. to be laid out in land, he would consider it as a legacy of money, and direct it should be laid out in the funds: and that, he said, would not prevent the land designed of procuring the queen's bounty; for the commissioners might, nevertheless, lay out their proportion of the augmentation-money in land.

No. 5.

ATTORNEY-GENERAL *against* GRAVES, 21st Nov. 1752.

Devise of residue  
of real and per-  
sonal estate

which consisted  
partly of a term  
in charity, whe-  
ther it be an old  
term, or created  
*de novo*, is with-  
in the statute of  
mortmain as to  
the term. *Ambl.*  
155.

QUESTION on statute 9. Geo. 2. Mortmain. A man possessed of a term not created out of his own inheritance, devises it to charitable uses: Whether it is within that statute, and void?

*Lord Hardwicke, Chancellor.*

I NEVER was more clear than that it is both within the intention and words of the statute. I will not construe this statute by the chicane with which the former statutes of

\* There were some other points arising on the construction of this will which came before the court of chancery, and are reported 2. Vez. 454. and 1. Wilson, 333.

mortmain, have been. It is a reproach to the law, that such construction was put on them as prevented their having effect.

THE old statutes of mortmain were aimed against a public mischief in a narrow view. As at that time trade and commerce were not introduced, the way of defence of the realm was by military tenure; and therefore they prevented lands totally getting into ecclesiastical hands. Afterwards, when trade and commerce were extended, the locking up of lands became of greater consequence; therefore it is too narrow construction to say, this statute only means devises, to the disherison of heirs. It takes in money to be laid out in land, which does not disinherit heirs. The words of the enacting clause are as strong as possible. It is true, the *irritating* or annulling clause must not be extended further than the enacting clause, but it explains the other.

QUERE, If any terms for years are within it, or is it to be confined to those cases only where the donor is seized of the inheritance?

It was argued, that a lease coming from another is personal estate, and the lessee may dispose of it as he will to charitable uses; and the statute of wills was cited as an authority which does not extend to terms of years. The reason is, because it begins, "If any person having or being seized of any manors," &c. and that made the great question in *sir Owen Buckingham's* case, where lord Holt observed on the word, "having."

• ALSO the Statute 29. Car. 2. Of Frauds and Perjuries was cited. It takes notice of all lands, &c. deviseable by the statute of wills, or by that statute, or the custom of Kent, &c. that shews that only freeholds of inheritance are within it; because terms of years are not within the statute of wills, nor deviseable by custom. Words of the statute—"any estate or interest whatsoever," was insisted on to mean only, that deviser should not devise his own land for any estate or interest whatsoever. No colour for that con-

struction; those words only relate back as well to lands and tenements as to personal estate. The annulling clause which affords a construction on the other, annuls all estate or interest in lands or tenements, and there is no colour for that distinction on those latter words. It might as well be said, that the words "nor any sums of money," &c. do not relate to money which devisor had of his own, but only to money directed to be laid out by some other person, and which the devisor took. 2. Inst. On Statute of Mortmain, makes strongest against this way of arguing that can be.

THE judges set out at first vigorously on Stat. Magna Charta. It was determined that fees only were within it; that long leases were not. Feigned recoveries and terms occasioned subsequent Statute Westm. 2. That was the original of common recoveries. The legislature in making Statute 9. Geo. 2. had all this in view, as appears by the recital; whereas gifts, &c. in mortmain are restrained by Magna Charta, and divers other wholesome laws.

SOME inconveniencies may arise on the construction either way; but by the other, all terms, long or short, are not within the statute; consequently property is locked up. All leases held of colleges would become charitable uses. As to a devise of surplus, part personal and part real, a mixed mass, where, not collusively, but fairly, every thing is ordered to be sold to pay debts, and the rest to charitable uses, I will not take upon me to say it would be void as to the charity; and that was the case of the Attorney-general against *the devise to Bethlem hospital*, a devise to Bethlem hospital. There was an agreement with the heir at law, and so nothing for the consideration of the court on the question of the charity: for, if an heir at law will confirm a devise of land to charity, the court will not take it away; for it becomes the act and deed of the heir. Whenever that question comes before the court, it will deserve great consideration. If it is done *arte vel ingenio*, to give colour

colour to hold the land, the court will meet with it. These statutes do not prevent charity, but the abuse of it.

NOTE, Mortgage in fee has been held by sir John Strange, the present master of the rolls, to be within the statute.

ON question as to marshalling assets in the above cause, lord chancellor Hardwicke said, I shall not set up a new rule for the benefit of charities, but they may have benefit of the old rule when there are general legacies, and the testator has charged his real estate with payment of all his legacies. If the personal estate is not sufficient to pay the whole, the court has said the legacy to the charity shall be paid out of the personal estate, and the rest out of the real estate, that the will of the testator may be performed *in toto*.

ATTORNEY GENERAL *against* JOHNSON.

No. 6.

*Lord Hardwicke, Chancellor.*

SIR DAVID WILLIAMS, by will 15th January 1612, devised the whole profits of the tythes of Gwentnor and Brecon to be disposed of for ever to the uses thereafter specified; and then gave to several charities, and other public uses, several certain sums to be paid annually, all which sums taken together made up the value of the tythes at that time. The tythes have since been greatly increased, and now produce, annually, more than sufficient to answer those particular sums in the will.

QUERE, Whether the surplus shall be applied in augmentation of those uses, or shall go to the heir at law? The case cited at the bar, of Thetford School, 8. Co. 130. b. is to the purpose; but difference argued, that the estate in that case was given to the feoffees. In this case the heir at law is the trustee; and testator might intend, if any surplus, his heir at law should have it; but in Thetford School's case, the surplus must have gone to the feoffees. Indeed, at the time that case happened, courts of justice had not

IN CHANCERY.  
12. NOV. 1753.

In a devise of the whole profits of an estate to charity, the rents are increased, they must go to the increase of the charity.  
*Ambl. 190.*

discovered that the feoffees would be trustees for the heir at law of the *surplus*, if there should be any: but this case is stronger than that, for the testator declares the whole profits should be applied: and being the case of tythes, it is much stronger still, because tythes are uncertain, and might by this time have been of much less annual value, by changing the arable and pasture, &c. It is a clear case. Refer it to the master, &c. But I do not intend all the uses should be proportionably augmented; such as 10 s. for annual sermon, &c. need no great allowance, unless, as the clergy in Wales are, in general, ill provided for, the augmentation may be considered as adding to his provision.

No. 7.

ATTORNEY GENERAL *against* SPARKS.

6th Dec. 1753.

Deville to charity; the rents being increased, the charity affected to be increased. *Ambl.* 202.

WILLIAM TYMPERON, by will 20th Nov. 1723, devised to Robert Davy for his natural life, and after his death to the ministers of St. John and St. Mary in Beverley, and of Aldborough in Yorkshire, for the time being for ever, all his manors in Aldborough, and all his lands, tenements, and hereditaments therein, and all his lands, tenements, and hereditaments whatsoever; and all fee-farms, furze, heaths, moors, marshes, ways, wastes, escheats, reliefs, heriots, profits of courts, with multitude of general words, to the uses thereafter limited and expressed; that is to say, if his personal should fall short in paying his debts, then by sale, mortgage, or leasing of the premises, or any part thereof, to pay and discharge the same, and to pay to two annuitants for life therein named, and since dead, to one 2*l.* 10 s. and to the other 1*l.* 5 s. a year, and to purchase a house near to St. Mary's church in Beverley, for the habitation of six poor men or women; two to be chosen out of the town of Aldborough, three out of St. Mary's, and one out of St. John, in Beverley, and to pay to each of them 2 s. 6 d. a week.

AND he also gave to the minister of Humbleton, in Yorkshire, for the time being for ever, 4*l.* a year. Robert

bert Davy and the annuitants being both dead, bill was brought for the establishment of the charity. It appeared that the testator's personal estate amounted to but 60*l.*; and at the death of the testator his real estate was but 50*l.* a year; but that is since let at 63*l.* clear of all taxes. It also appeared that the trustees had, with the rents, paid off the testator's debts, and (*inter alia*) a mortgage upon the estate of 400*l.* and interest, and that there remained in their hands 139*l.* 10*s.* 0*d.*; and also that they had contracted for a house in St. Mary's, but not paid for it.

• QUERE, What shall become of the surplus rents after payment of the 2*s.* 6*d.* weekly to six persons each, and the 4*l.* a year to the minister of Humbleton, they amounting only to 43*l.* a year; whether they shall go to the heir at law as undisposed of, or be applied in augmentation of the charity?

AFTER argument at the bar, in which I cited the Attorney-general and Johnson 13. Nov. last,

SIR JOHN STRANGE, master of the rolls, who sat for Lord Hardwicke, chancellor, gave his opinion.

THE intention of the testator was clearly to dispose of the whole estate to charity. He could not have any idea at that time of his estate increasing in value, or intend the surplus to his heir at law. The personal estate amounted to but 60*l.* His real estate was subject to a mortgage of 400*l.* made chargeable with two annuities for lives, and to the expence of buying a house; and was, in the whole, at his death, worth 50*l.* a year. He has used all the general words he could devise, to take in all sorts of right. If his intention is plain, there is no need of very particular words to pass this devise. The estate has increased in value; that he could not foresee. Suppose it had been decreased; the six poor persons, and the minister of Humbleton, must have borne the loss. It is but justice they should have benefit of the increase. Of opinion the court ought to direct the surplus in augmentation of the charity.

## CASES ON THE STATUTE OF MORTMAIN.

It may augment the allowance, if not the number of objects. Attorney-general and Johnson is in point.

DECREE. The present charity is to be augmented after deducting for repairs of the house and other necessary expences.

No. 8.

\* GRIMMETT and GRIMMETT.

IN CHANCERY,  
20<sup>th</sup> and 21<sup>st</sup> Feb.  
1754.

One devises money to a charity, and directs it to be laid out in the public funds till the whole can be laid out in lands to the satisfaction of his trustees; held not within the statute of mortmain. *Full. 210.*

W. GRIMMETT, by will 13<sup>th</sup> March 1749, devises to his brother James Grimmett the sum of 20*l.* a year during his life, to be paid him half-yearly, out of the interest-money in the public funds, or mortgages, or any his real or personal estates of which he should stand invested; and gives the rest and residue of his real and personal estate to his wife for life, and to dispose of at her death; and then directs the remainder of his estate, after his wife's death, to be divided into twenty-four parts, nineteen of which he disposes of; and by codicil, dated the next day, he directs the remaining five twenty-fourths, after the death of his wife and payment of his debts and legacies, and also the 20*l.* a year, after the death of his brother, to be applied in clothing and educating twenty poor boys, sons of parishioners of Brixthelmstone in Suffex, in the principles of the Protestant religion, agreeably to the present national and established church of England, and in reading, writing, arithmetic, merchants accounts, and navigation; none to be admitted after eight, or continued after fifteen. And his will and pleasure is expressed to be, that the five twenty-fourths of his estate, after his debts and legacies paid, together with the 20*l.* a year after the death of his brother, or (which should be deemed as an equivalent to the 20*l.* a year) 570*l.* to be invested in some of the public funds, where there is a parliamentary security, to stand in the name of trustees until the whole can be laid out in the purchase of lands to the satisfaction of the governors and trustees (whom he appointed), which lands are directed to be purchased in the

names

names of the trustees to the uses aforesaid; that is, the interest, profits, and rents of the five twenty-fourths of his estate, together with the interest, profits, and rents of the said 570*l.* after the death of his brother, or the lands that should be purchased therewith, should be applied annually for ever, in clothing and educating twenty poor boys, as aforesaid.

THE testator left no real estate.

TWO questions. First, Whether the devise to the charity is within the statute of mortmain, and void? Secondly, If it is, where the money so devised shall go, whether to the next of kin of testator, or pass to the wife as part of the *residuum*?

ON behalf of the charity was cited Sorelby and Hollins, 6th Aug. 1740. John Nayler desires his executors within twelve months after his decease to settle and secure by purchase of lands of inheritance, or otherwise, as they should be advised, out of his personal estate, one annuity or yearly payment of 50*l.* to be paid yearly, and distributed for ever by his executors, their heirs and assigns, amongst the poor and indigent people of Leek in Staffordshire, in such manner as they should think fit; and also to settle and secure one other annuity of 5*l.* to be paid yearly to the vicar of Leek for the time being for ever; for preaching an annual sermon on every 12th of October.

LORD CHANCELLOR. The only question is, Whether the devise of the two annuities to charitable uses is void by statute of mortmain? The testator directs his executors should settle and secure by lands of inheritance, &c. and if testator had rested upon such first words, this devise would have been clearly void; but then he goes on in the disjunctive, or otherwise, as they shall be advised. If a devise is in the disjunctive, and leaves the executors to two methods to do a particular thing, the one lawful, the other prohibited by law, can any court say, because one method is unlawful, that therefore the other must be so too, and



the whole bequest is void? No: for if one method is lawful, that one shall be pursued and take effect. Decreed the devise to be good, and the money to be invested in South Sea annuities. Like *Grayson and Atkinson*, 7th Nov. 1752, it was insisted, for the charity, that there is an election in the present case, in the trustees, either to lay out the money in land, or continue it in the funds.

*Lord Hardwicke, Chancellor.*

THIS is not a clear case. Q<sup>t</sup> If this is a good and valid disposition of the 570*th* and five twenty-fourths of the remainder of testator's estate, or void by the statute of mortmain?

I THINK it would be a hard construction to say such a charitable bequest is void by the statute. If a person directs money to be laid out in lands for a charitable use, it would be void, although the court would order the money to be placed in the funds till the purchase is made: so where a man gives it in such manner that the land to be purchased is the final end and thing given. But where there is sufficient room for the court to say there is a discretionary power in the trustees to lay the money out one way or other, either in the funds or in lands, I have determined such a devise to be good; as in *Soresby and Hollins*, and *Grayson and Atkinson*, 7th Nov. 1752. I am of opinion there is room to construe this bequest with such latitude.

I do not lay any weight on the directions to place the money in the funds in the first place, for that would be to make the validity of a will depend on the order of the words. The direction is to place the money in the funds until laid out in lands to the satisfaction of my trustees. When can that be? Not while this statute is in force. Suppose it had been till by law it may be, such bequest would be good. Those words must mean, when the trustees approve of laying it out. That cannot be while the statute of mortmain is in force; it would be to act contrary to their trust.

It was said, the rule of construction, as to devise of money to be laid out in lands, is the same now as it was before the statute of mortmain. That is true. But suppose the trustees in this case would not act, the trust would devolve on the court, and I would order the money to be placed in the funds, and not invested in lands.

SIR JOSEPH JEKYLL always did so before the statute. I would not be understood to set up a different rule of construction of wills since the statute of mortmain, from that which prevailed before. This would, in my opinion, have been a sound rule before the statute.

AN observation arises on the face of the will, as if testator had thought this bequest might continue on government securities for ever.

He directs the application of the interest, profits, and rents of the five twenty-fourths, and of the 57*l.* or, of the lands which should be purchased therewith. It being in the disjunctive, seems to give an election: the words "for ever," are applicable to both alternatives.

No mischief will follow from hence: this is a different sort of charity from those pretended ones in time of popery and monkery.

## No. XVIII.

DECREE of LORD CHANCELLOR NORTHINGTON  
*in the Removable CASE of NORTON v. REILLY*  
 & AL. 10th Dec. 1764. Reg. Lib. B. 66.

*THIS was a bill filed by the plaintiff, a feme sole, against the defendant Reilly, a Methodist Preacher, and Others, trustees named in a deed of gift executed by the plaintiff to the defendant: Praying, that such deed might be delivered up to be cancelled, and that the defendant Reilly might be restrained from proceeding at law for the recovery of the arrears of an annuity of 50l. granted by the plaintiff to said defendant, and refund such monies as he should appear to have obtained from the plaintiff; alleging, that the defendant had, by various frauds and impositions, prevailed upon the plaintiff to advance him several sums of money at divers times, and to execute a deed (thereby suggested to be in consideration of 10s. and for other valuable considerations) for granting an annuity of 50l. a year to the defendant, and secured upon her real estates. The bill stated several curious letters from the defendant to plaintiff, and various acts of fraud, imposition, and misrepresentation, on the part of the defendant.*

**IN CHANCERY.**  
*Norton v. Reilly.*

**Court of chan-**  
**cery will relieve**  
**in case of a deed**  
**obtained under**  
**circumstances**  
**of fanatical de-**  
**lusion.**

**T**HIS cause, as it has been very justly observed, is the first of the kind that ever came before this court; and I may add, before any court of judicature in this kingdom. Matters of religion are happily very rarely matters of dispute in the courts of law or equity. In regard to Protestant Dissenters, under which denomination it has been attempted to shelter and include the defendant Reilly, no man whatever has a greater regard and esteem for those who really are so, than I bear; and God forbid that in the present age the true dissenters of every kind should not be tolerated, or that the spirit of christianity should in  
 this

this kingdom lose the spirit of moderation. I can and do esteem the professors of one equally with those of our own established church, to which, not only from the profession of my faith, but from my principles, I bear an higher veneration: but very wide is the difference between dissenters and fanatics, whose cautions and whose doctrines have no other tendency than to plunge their deluded votaries into the very abyss of bigotry, despair, and enthusiasm; and though even against those unhappy and false pastors I would not with the spirit of persecution should go forth, yet, are not these men to be discountenanced and discouraged whenever they properly come before the courts of justice? men who go about, in the Apostle's language, creep into people's dwellings, deluding weak women? men who go about and diffuse their rant and warm enthusiastic notions, to the destruction not only of the temporal concerns of many of his majesty's subjects, but to the endangering their eternal welfare? And shall it be said that this court shall not relieve against the glaring impositions of these men? not relieve the weak and unwary, even though their impositions are exercised on those of the weaker sex? It is by no means arguing agreeably to the practice and equity of this court to insist on it: this court is the guardian and protector of the weak and helpless of every denomination, and the punisher of fraud and imposition in every degree; yes, this court can extend its hands of protection; it has a conscience to relieve, and the constitution itself would be in danger if it did not. To come to the present case: Here is a man, nobody knows who or what he is; his own counsel have taken much pains, modestly, to tell me what he is not; and depositions have been read to shew that he is not a *Methodist*. What is that to me? But I could easily have told them what, from the proofs in this cause, and his own letters, he appears to be—a subtle sectary, who preys upon his deluded hearers, and robs them under the

*mask*

*mask* of religion; an itinerant, who propagates his fanaticism even in the cold northern counties, where one would scarce suppose it should enter. Shall it be said in his excuse, that, as to this lady, she was *as* great an enthusiast as himself when he first became acquainted with her, and consequently not *dehuded* by him? It appears, indeed, that she wrote some verses: "On the Mystery of the Union of the Father, Son, and Holy Spirit." 'Tis true, by this, she was far gone, but not gone far enough for his purpose, as we shall find by his own letters: in one he says, "Your former pastor has, I hear, excommunicated you; but let not these things discourage you, but put yourself in my congregation, wherein dwells the fulness of God." How scandalous, nay, how blasphemous is this! In another his mystical *expression* runs, "You will be there weaned from men, and learn to complete the fulness of gospel peace." Thus was she advanced step by step, and imbibed his doctrines, till quite intoxicated, if I may use the expression, with his madness and enthusiasm.

BUT the very material and most essential point in law, *the consideration of the deed*, say the descendant's counsel, is the dedicating the principal part of his time in attending the spiritual concerns of this lady, and neglecting his *flock*, who thereupon *deserted him*; the only good thing, in my opinion, *that appears in the cause*. But did he receive no consideration, no recompence for his service? Let us examine a little. Does he come from Leeds to London in the ordinary way, a stage-coach? No: he must have a post-chaise, and live elegantly on the road, at the plaintiff's expence; who, it appears, at different times gave to, or paid for, him to the amount of '52 *l.* 19 *s.* in money, besides presents of liquor and other things; so that his own hot imagination was further heated, we find, by the spirit of brandy; for all which favours in a third letter his expression is, "I thank you in the name of Our Saviour for all kindness to me." Thus is the Deity introduced to  
thank

thank her for her services. But this, I suppose, *like the fulness of God*, as was observed by one of the counsel, is to be taken *figuratively*. I might, I believe, with more propriety say, this 50 l. a-year was figurative and expressive of the lady's whole fortune. We will take a short view how he proceeded to come at it. The lady comes to town by his persuasions, where possibly she had never been before, goes and lives in Surrey, as in an inquisition; for she is put into a house environed by an high wall, and no one is to have access to her but her pastor or the attorney, on the present occasion of preparing the deed in question; whereby the defendant was to step into and secure a part of her fortune under the veil of friendship, or rather by lighting up in her breast the flame of enthusiasm: and undoubtedly he hoped, in due time, to secure the whole by kindling another flame, of which the female breast is susceptible; for the invariable style of his letters is, "all is to be completed by *love and union!*" But to return: In this place of inquisition she is by them tutored to be private in her charity, so that her relations, who are injured, were to know nothing of her present bounty. But would not any man of honour in the profession have told her, "Madam, you are going to do a thing which may embarrass your circumstances, and injure your relations; a thing which the law will not support unless it is fairly and openly obtained; and therefore, unless you will apprise your friends of it, I will not be concerned." This, I say, was incumbent on the attorney to have done; but this was omitted, and it was done in secret. Yet let it not be told in the streets of London, that this preaching sectary only defended his just right, and must be supported in it. Let them not be persecuted, I repeat; but many of them deserve to be represented in puppet-shews. I have considered this cause not merely as a private matter, but of public concernment and utility. Bigotry and enthusiasm have spread their baneful influence amongst us far and wide, and the unhappy ob-

jects

jects of the contagion almost daily increase : of this not only Bedlam, but most of the private madhouses, are melancholy striking proofs. I have stayed much beyond my time, have given this cause a long and patient hearing; and inasmuch as the deed was obtained on circumstances of the greatest *fraud, imposition, and misrepresentation* that could be, let it be decreed, That the defendant Reilly execute a release to the plaintiff, Mrs. Norton, of this annuity, and deliver up the deed for securing it; and if any difference arise, let the same be settled by the master, who is to take an account of all sum or sums of money paid by the plaintiff, Mrs. Norton, to the defendant, or to his use; for which purpose all proper parties are to be examined upon interrogatories, and all which sums the defendant is hereby decreed to pay, together with the costs of this suit. I cannot conclude without observing, that one of his counsel, with some ingenuity, tried to shelter him under the denomination of an *independent preacher* : I have tried, in the decree I have made, to spoil his independency.

## No. XIX.

WEST *versus* ERISSEY, in SCAC. TRIN. 1726 \*.

## C A S E.

**A**RTICLES on marriage to settle lands on husband and wife for their lives, remainder to the heirs male of the body of the husband by the wife, remainder to the heirs male of the body of the husband by any other wife, remainder to the heirs *female* of the body of the husband by this wife. A settlement is made before the marriage, and said to be pursuant to the articles, whereby the lands are limited to the husband for life *sans* waste, and with power to make leases, remainder to the first, &c. son of the marriage in tail male, remainder to the first, &c. son of any other marriage in tail male, remainder to the *heirs of the body* of the husband. There are issue two daughters; and the husband suffers a recovery, and devises the premises to his sister. The daughters may in equity compel the devisee to convey the premises to them.

*Pengelly, Chief Baron.*

I SHALL always be willing to follow precedents of the court of chancery, but not willing to go further; for if after a settlement is executed and acquiesced under for a great number of years, the parties shall say there was an

\* This Case is stated and reported in Comyns, 416. and in 2. Peere Will. 349. which, however, contain a very short note of this decree in the court of exchequer. In Comyns there is the judgment of the house of lords: and in 3. Bro. P. C. 327. and in Peere Will. as above, a more full report of the case, and of the arguments and judgment in H. L. by which this decree of the court of exchequer was reversed.



agreement contrary to the terms of the settlement, and that therefore the settlement ought to be varied; this would make limitations of estates too uncertain and loose, and courts of equity would make settlements rather than the parties.

By the act to preserve estates to posthumous children, it seems that neither law nor equity could, in that case, help such issues, and therefore that case required the assistance of the legislature.

If there was a defect of trustees to preserve contingent remainders, there is no instance (that I have ever heard of) of a court of equity supplying that defect; neither is there any instance of a court of equity setting aside conveyances by tenant for life, and trustees for preserving contingent remainders; though it is said in the case of *Pye and Gorge*, that it would be a breach of trust.

THERE is a great difference between carrying articles into execution by a court of equity, and a court of equity varying a settlement made after articles.

*P. Will. 622.* THAT in the case of *Trevor and Trevor* there was no settlement.

I AM determined now in my judgment upon these articles by the explanation of them by the settlement subsequent and before the marriage took effect.

THE length of time is material; for now less proof will satisfy, after such a length of time, than would have done in case the matter had been recent.

MARY lived till the year 1715, and she never required a strict settlement; and I should think that a court of equity should not carry articles of this nature into execution after a great length of time.

UPON the articles, Richard has an indisputable estate tail; but it is objected, that the intent is otherwise: If it had been expressed, that there should have been a strict settlement to daughters, I must have been bound by it.

THE

THE settlement in this case is as much in favour of daughters as the articles; but there was a greater regard had to heirs males than to daughters, for there was no remainder limited to daughters until after the default of issue male by any rentor.

HERE then is an explanation of a doubtful intention in the articles by a settlement cautiously drawn, executed by the same parties, and without surprise.

IN the case of *Honor and Honor*, the estate was not limited to the same persons as was intended by the articles. 1. P. Will. 123.

IT would be hard if after sir Peter Killebrew (who was the father of the lady) had acquiesced in this settlement during his life, that I should now disturb it.

THE parties themselves have done what is fought by this bill; that is, have carried these articles into a legal execution.

THE common course of settlements is, to limit the estate to the father for life, remainder to trustees, &c. remainder to the first and other sons, &c.; but it is not so in the case of daughters; and the common course of conveyancing is to be regarded.

As there has been an execution of the articles by a legal conveyance, it would be too hard in a court of equity to set it aside.

*Baron Hale* dubitavit.

*Baron Carter*.

THAT were it in the case of a son of that marriage, though there were no trustees, &c. yet a court of equity would carry it into execution not so in the case of daughters.

*Baron Comyns*.

THIS case goes farther than any precedent, and farther than reason can carry it.

IN this case there was not so great care taken for the issue female as for the males; for the issue male of any other wife, though strangers to the consideration of this marriage, are by these articles preferred before the issue female of the marriage.

WHY cannot this settlement be said to be as full a declaration of the intent of the parties at the time it was made, as the articles were at the time they were entered into?

IT is in proof that this settlement was drawn by counsel, and with deliberation; and wherein it varies from the articles, we should presume a second agreement.

THE grounds of varying deeds in a court of equity are, that the parties intent has, either by fraud or misapprehension, been mistaken; and I have not known an instance of a settlement being varied, unless it appears from articles, or from proof, to have been contrary to the intent of the parties; which is not the case here.

#### AT ANOTHER DAY.

*Baron Hale.*

IT is not usual where an estate for life is limited, with remainder to the first and other sons, that there should be the like estate to daughters.

THERE is a strong presumption that this settlement was a declaration of the intent of the parties by the articles.

IT would shake all purchases and settlements, if, after so long a tract of time as in this case, we should have recourse to articles to find out whether there was any variation from them in settlements made in pursuance thereof.

*Baron Carter.*

WHEN the settlement was made, the marriage was founded upon the settlement, and not upon the articles.

*Chief*

*Chief Baron.*

IF we should set aside this settlement, the next step would be to set aside all the purchases made under the recovery by Richard; which would have shocked us at the very first hearing. It is time, therefore, to stop here.

THERE is great difference between coming to a court of equity for an execution of articles by a settlement, and coming to set aside a settlement before marriage as variant from articles; and it would be too dangerous, after forty years acquiescence, to shake this settlement.

THE bill dismissed *per tot. Cur.*

[*This Decree in the Court of Exchequer was, Feb. 15, 1727, reversed on Appeal, by the House of Lords. Vide 3. Brown, P. C. 337. Viner, v. 15. 286. p. 3. 294. p. 13. 2. Eq. Cas. Ab. 39. p. 2. Forrester, 20. Fearne's Cont. Rem. 66. 75*]

## No. XX.

ATWOOD *versus* EYRE in CHANCERY \*.*Significavit*  
quashed.

**M**OTION, to quash the following *significavit*: “To  
 “ the most serene prince in Christ George the  
 “ Second, &c. I William, archbishop of Canterbury, &c.  
 “ signify and make known, that the right worshipful J. Bet-  
 “ telworth, dr. of laws, official principal of our arches court,  
 “ of Canterbury, lawfully appointed, in right and due pro-  
 “ ceedings in a certain case of appeal and complaint concern-  
 “ ing matters merely spiritual, brought before him in judg-  
 “ ment by the reverend G. Atwood, bachelor of divinity,  
 “ archdeacon of Taunton in the province of Canterbury,  
 “ against the reverend T. Eyre, clerk, master of arts, vicar  
 “ general, and official principal of the right reverend fa-  
 “ ther in God the bishop of Bath and Wells, at the peti-  
 “ tion of the procurator of the said G. Atwood, did decree  
 “ the said T. Eyre for his manifest contumacy and con-  
 “ tempt in not appearing before our said official princi-  
 “ pal, &c.”

THE case appeared on the appeal to be this: Eyre, chancellor of the diocese of Bath and Wells, cited Atwood, archdeacon of Taunton, *ex mero officio*, to appear before him, and bring into his registry all the wills he had proved (which citation was founded on the 126th canon). The archdeacon accordingly appeared, and alledged, that he was not obliged to bring in the wills, because he hath an ancient registry; whereupon he was ordered to appear again; but he not appearing, the chancellor decreed him to be ex-communicated. From thence the archdeacon appealed to the dean of the arches, and he decrees an inhibition and citation; which last being personally served on the chan-

\* The precise date of this case does not appear, and it seems to have escaped the notice of all the writers on the subject.

cellor, he said he would not obey it; and he ordered the excommunication to be published, and sequestration to go out as to both the archdeacon's livings; which accordingly issued: thereupon the archdeacon brought a second appeal to the dean of the arches, who called the chancellor to answer; which not doing, he was pronounced in contempt: and after a further time given him to appeal, which he still refused, he was excommunicated, and after signified.

It was objected to the *significavit* by mr. Fazakerly, (1.) That it is not under the archbishop's seal. (2.) That it does not sufficiently express for what cause the chancellor is excommunicated; whereas it ought to have set out the nature of the case; that it might appear whether it was of ecclesiastical jurisdiction. King and Fowler, Salk. 293. Trollop's case. The sentence made by the original judge is not to be called in question but by those who have a jurisdiction; and if he hath made a decree in a case where he had no jurisdiction, another ecclesiastical judge cannot take notice of it.

If therefore they have excommunicated a person where they had no jurisdiction, and the excommunication is not made void, his liberty is taken away by a void act; and a writ of *excommunicato capiendo* must be in force to compel him to appear before a court that hath no power to call him before them. On non-appearance to a citation (in which case there is nothing before the court but the citation itself, which is only to call the party to appear), a sufficient cause must be set forth, that the matter may appear to be of spiritual cognizance.

It was answered by dr. Paul (the king's advocate), and Willes, attorney general, (1.) That the archbishop hath several courts; in each of which he hath a particular seal (and he may surely seal as he please); and this is the ancient seal of this court, and the *significavit* here (according to the constant practice) in the archbishop's name, and is

his certificate, being both in his name and sealed with his seal. (2.) That the cause here of the excommunication is sufficiently expressed by the words (concerning matters merely spiritual); which is a technical term, and denotes no more than that it was a cause of which an ecclesiastical judge hath jurisdiction. If an ecclesiastical judge thereof hath jurisdiction of this case, the question will be, If the dean of the arches hath a jurisdiction there? which he plainly hath by the 24th E. 3. c. 12. on which the archbishop's jurisdiction is founded. By that statute the ecclesiastical court had a right to receive this appeal; and if it hath not a right to cite the parties, it is giving a jurisdiction without a sufficient means to enforce it; and if they have a power of citing them, excommunication is the proper process to make the citation effectual: indeed, where the proceeding is in an original cause, the nature of the cause must be set forth, according to the rule in Salk. 293. and according to Trollop's case; but this being upon an appeal (which proves nothing, but is only a suggestion of the party complaining, and warrants the superior judge to grant a citation), and the proceedings below not being transmitted to the archbishop, he cannot possibly certify any thing farther than is done here; for one bishop cannot certify for another, 1. Inst. 134. 2.; and the archbishop could only transmit what was before him; which plainly distinguishes this from an original cause, where all the proceedings are before the judge, and he may set forth the nature of it. Besides, suppose the chancellor should, *ex officio*, cite a party in a cause of a temporal nature, he is not to be admitted to say afterwards that it is not of ecclesiastical cognizance, in order to screen himself from an appeal upon the whole. The archbishop here hath a jurisdiction by statute: a contempt warrants an excommunication; and the archbishop could certify no other than that he hath done: and if the chancellor is not to be held by the

the archbishop's certificate, he must certify what was done before.

*Lord Chancellor.*

THE first objection is not at all material. The second is with regard to the general manner of describing the case. Though the court of common law is bound to assist the spiritual court in matters of spiritual cognizance, yet it must appear in the certificate, before a writ *excommunicato capiendo* issues, that it was a cause depending before them, and of which they had cognizance, and this antecedent to the 5th Eliz. ch. 23. and the bishop's certificate ought to express the particular cause of excommunication. This court is not to assist the spiritual court in proceedings where they have not a jurisdiction, nor ever to trust to their saying they had a jurisdiction, but the law leaves it to this court to judge; and if it doth not appear to be of spiritual jurisdiction, this court stops the writ.

THE question here is, if this *significavit* hath described the case sufficiently with regard to the expression (concerning matters merely spiritual)? They are, indeed, technical words, and are the same as to say, concerning a matter of which the spiritual court hath jurisdiction: but these last words are not sufficient; for this court is to enquire whether they have a jurisdiction? and not to take the word of a spiritual officer.

WHETHER the words in the writ may not take in things which belong to the common-law, I cannot tell; but I will not take any ecclesiastical judges words for what is in their jurisdiction. We have found by experience, if they could they would bring almost every thing under their jurisdiction; as witness that case mentioned by dr. Paul, of excommunicating a person *propter elisionem fidei*, because the party warranted the horse sound when it was not; and that other case mentioned by him, of excommu-



nicating a Quaker for not paying marriage fees, though married at their own meeting.

THAT which makes the difficulty here is, that this excommunication is not pronounced in an original case, but in case on appeal; and it is said, that whether the judge below had or had not a jurisdiction, the dean of the arches had a jurisdiction: but if the case below was of such a nature that the inferior judge had no jurisdiction, a superior ecclesiastical judge cannot have one, and hath no right to proceed in any case of appeal brought thereon, because the inferior might have been hindered by prohibition. Here the archbishop did not think it enough to say that it was an appeal, but also adds, that it was concerning a matter merely spiritual. It is objected that the proceedings are still in the court below, and that thereof the archbishop could not certify otherwise than he hath done here. But when it is considered that the appeal describes the case, that is an answer to this objection: for though the appeal cannot be taken to be true, but the complaint must prove his suggestion, yet it is true *prima facie* all one as a citation, or as a bill on a demurrer, which is taken to be true at that time to determine the matter in dispute; so that the judge might have described the case in the same manner as it is in the appeal: the description of the case therefore is too general, and the *significavit* must be quashed.

[This was taken down in short-hand by Mr. DENT,  
of Lincoln's-Inn.]

No. XXI.

CASE on DEVISE of REAL and PERSONAL ESTATE;  
With MR. PEERE WILLIAMS'S OPINION,

JAMES SMITH, esq. being seised of several freehold lands and houses, by his will, amongst other things, gives as follows, viz. "Item, I give and devise unto my son Thomas Smith, and his assigns, all that my house, with the appurtenances, situate and being in Friday-street afore-said, and now in possession or occupation of Mr. Thomas Sandford, or his assigns." And the residue of his estate the testator gives in these words, viz. "And as to the residue of all my goods, chattels, and estate whatsoever, after all my just debts, legacies, and funeral charges paid and satisfied, not herein or hereby before devised, I do hereby give and devise the same unto my said brother-in-law, William Burrell, and to my said daughter Ann Smith, whom I do hereby make, constitute, and appoint to be executors of this my last will and testament."

Aug. 21. 1708.  
Case, whether the word assigns, in a will, carries a fee simple, or only tenancy for life,

NOTE. The testator, James Smith, had an elder son named John Smith, who died some years ago, but left a son, who is now living; and the above Thomas Smith, his uncle, is lately dead intestate, and without issue; and the son of the said John Smith claims the above-mentioned house, as heir at law to the said intestate; and the said Ann Smith, now Ann Mead, who survived the said William Burrell, claims the said house by virtue of the said residuary devise; therefore, as this case is,

Q. WHETHER the son of the said John Smith, or the said Ann Mead, is intitled to the freehold and inheritance of the said house?

I AM sensible there is a great authority in this case; which says, that "if one devise lands to one and his assigns,"

“signs, without adding the words (for ever), that this “passes but an estate for life,” 1. Inst. 9. b.

BUT, with deference to this great authority, I think there is reason to make at least some doubt what the law is in this point. The Year-books cited by lord Coke in the margin, do not warrant this opinion; and there is the authority of a very learned judge, mr. justice Doderidge’s opinion, Latch. 42, differing from opinion of lord Coke. And the reason of the case seems to me in favour of judge Doderidge’s opinion: for a devise of land to a man and his assigns, seems to import a devise of lands to a man to assign or dispose of as he thinks fit; which words in a will pass a fee. And in the same place, in 1. Inst. 9. b, it is said, “If I devise lands to one to give and to sell, “this is a fee.” And as to the objection, that where lands are devised to a man and his assigns, that the words (and his assigns) are satisfied by the devisee having a power to assign over his estate for life; by the same reason it must be said, that where lands are devised to one to give or to sell, these latter words might be satisfied, the devisee having a power to give or sell his estate for life, and a vendee is an assignee; whereas it will be admitted, that those latter words, in the last case, pass a fee. Besides, if a devise be to a man for life, the devisee might sell or assign over that estate for life, without adding to the devise the words (and to his assigns); and, by construing this will to pass only an estate for life, makes the latter words (and his assigns) to signify nothing, and to be quite useless; which is against the rules of construction, especially in case of wills: so that I rather take it, that by virtue of this devise to the testator’s son, Thomas Smith and his assigns, an estate in fee simple did pass to Thomas; and upon his death without issue, the house in question descended to his nephew, the son of his elder brother John Smith deceased. But admitting that by this first part of the will only an estate for life passed to the testator’s son Thomas,

to him and his assigns, the next question is, Whether by the devise of residue of all the testator's goods, chattels, and estate whatsoever, the reversion in fee of the house in question did pass by the latter devise to the testator's brother-in-law and daughter? And I rather take it, that the reversion in fee does not pass, nor any estate therein; because the word (estate) is coupled with the words (goods and chattels), and consequently must be likewise a consimular sense, and must be taken to mean all the testator's personal estate whatsoever; and as it is doubtful whether this devise includes only all the testator's personal estate whatsoever, or all the testator's real and personal estate whatsoever; and as it is a rule, that by doubtful words an heir shall not be disinherited; so I am inclined to think, that this latter devise shall not extend to pass the reversion in fee to the testator's brother-in-law and daughter; and the rather, because by the next words immediately following, the testator nominates his said brother-in-law and daughter sole executors of his will; which seems to shew, that at the time of the making of this latter part of his will, only the testator's personal estate, and not his real estate, was in his contemplation. However, both these points seem doubtful.

W. PEELE WILLIAMS.

January 4, 1734.

## No. XXII.\*

## OBSERVATIONS on the GREAT EXPENCE of PROSECUTING SUITS at LAW, with a PLAN proposing a REMEDY.

**W**HILST every person looks with admiration on the system of the English law, so wisely calculated to advance justice, and redress wrong, there is no one who does not regret that it is not equally open to every class of people; to the poor as to the rich, to the peasant as to the lord.

BOLD, may even contradictory, as this may seem, yet every one who reflects on the enormous expence attendant on a trial for the recovery of a small demand, or for the redress of an injury, not of the utmost magnitude, proportioned to the sum recovered, will see the justice of it; will perceive, that although the systematic part may command our reverence and respect, yet that the practical part, has been shamefully suffered to impress upon the minds of the less opulent a contempt of law, and a fear of applying for its protection, because they cannot purchase redress for their complaints, but at the expence of total ruin.

It is well known to every one, that if a person in the lower rank of life has a demand of a sum which is to him considerable, and should institute a suit for the recovery of

\* We insert this article at the request of a correspondent, though not strictly within our plan, but as deserving notice on account of some useful hints for improvement in the present mode of distributing justice; and which seem warranted by the precedent of the commission which has been lately issued by the Lord Chancellor, empowering the magistrates therein named to determine certain causes, thereby obviating the delay and other inconveniences which would attend a further commitment for trial in a superior court.

## OBSERVATIONS ON SUITS AT LAW.

it, and gain the cause, that the expences which he himself has, to pay will exceed the sum recovered; and that, instead of gaining his demand with his cause, he will in general be a loser of considerably more; even supposing his debtor able to pay the debt, and taxed costs; and, if the debtor be not able to pay them, that he will almost inevitably sink under the load of his own loss, and end his days in the same prison to which his debtor has been consigned; there to contemplate the wisdom of that institution which has so wisely provided for his redress, but has neglected the means of attaining it.

To endeavour at an attempt to obviate this difficulty (not to shew the hardship of it, which is universally known and experienced), is the object of this paper: to raise up more able and experienced advocates to attempt the removal, not to recommend his own plan, is the design of the Writer.

He will therefore presume to point out a method of administering justice at a comparatively slight expence, in order to induce others to attempt a more complete plan, which may meet with the approbation and encouragement of those who only can redress the present hardship.

THE expences of a law-suit chiefly arise after the cause is at issue. The preparing the record, entering the cause, paying the different fees of office, and particularly the attendance of witnesses at a considerable distance from their places of abode, are what most materially swell a law-bill. These would be much lessened, and some totally avoided, in the practice of borough courts established in many parts of this kingdom; courts which would prove of the greatest benefit to the places over which their jurisdiction extends, but that, according to the present practice, from removals and other causes, delays and expences greater than would otherwise be sustained, frequently are, and generally may be, occasioned. They have, however, given rise to the following plan:

SUPPOSE

## OBSERVATIONS ON SUITS AT LAW.

SUPPOSE that in every part of the kingdom districts should be allotted, of not more than a certain number of miles in extent; and that the boundaries should be expressly ascertained. That over each of these a barrister of experience and ability should preside as judge, with a power of summoning a jury of the place. That all writs and process should issue, as at present, from the chancery to the courts at Westminster; and, from those courts to the sheriffs of the different counties, returnable, not into the courts above, but into the court of the district where the cause is proposed to be tried; which is then to be fully, possessed of the cause, subject to the controul of the superior courts in matters of discretion, upon motion, as now practised. That the pleadings shall be delivered, issue made up, and the cause tried, agreeably to certain rules to be established for the regulation of the practice in all the districts. That in every case, when the cause comes to trial, instead of a general verdict, the jury shall find the facts proved; which shall be taken down and annexed to the pleadings, upon which the judge of the district shall give judgment; and that the judgment may be removed by writ of error, by either party, into the superior court issuing the first process, and proceedings be had thereupon as at present. New trials may also be moved for in the superior court.

THESE are the outlines of a plan which, I conceive, will, in a great degree, answer the end proposed; and at the same time be advantageous to the study and knowledge of the law.

THERE are certainly some objections to it. One arises where the witnesses live in different parts of the kingdom; but any thing of this kind might be regulated, and the place of trial fixed or changed by the superior court upon affidavits, so as to administer complete justice. Many other objections are obvious; but they, perhaps, might be removed by a skilful hand.

THE

## OBSERVATIONS ON SUITS AT LAW.

THE advantages are, That every case of difficulty will be determined upon special verdict, so as always to be a rule in a case similarly circumstanced; and latest posterity will see the evidence upon which the decision has been made. That in every case recourse may be had to the *derniere resort*, and a party will not be necessitated to abide by the opinion of one judge, or of one court, which must often prove erroneous. That although a cause may occasion more trouble in the conducting, yet that many proceedings will be rendered unnecessary. • A great expence will be saved, even though the opinion of the court above be taken on every case; yet no detriment will arise to the revenue, the savings being made from the expences of witnesses and the fees of office; and there will not be greater, if so great, delay in the issue of a cause. •

It will also, most probably, operate to lessen the number of attornies, as they must have a competent knowledge of the profession to conduct a cause, and to take down and judge of the manner of drawing a special verdict; which will prevent those who have not the means of studying the law from entering into the profession; and may serve as one means of bringing the law itself again into the reputation it seems to have lost, to rescue the professors of it from the disgrace and odium which are universally attendant upon the practice of it.

THIS change, it must be confessed, is an extensive one, and contrary to ancient practice, and would even render an assise unnecessary for civil causes. But it should be remembered, that the institution of an assise was nearly a similar attempt, allowing for the difference of the times and of personal property; and yet no one doubts of the advantage derived from that institution. At any rate, nothing is here proposed contrary to the theoretical part of the law; and it is obvious that the practical part must require alterations, and be adapted to the times, if it is wished

that



## OBSERVATIONS ON SUITS AT LAW.

that any one should derive advantage from it. And surely that time is now come; when a learned barrister, in the hearing of a judge, has blamed an attorney for not advising a client rather to reduce his demand, so as to bring it under the jurisdiction of a court of request, than to bring an action at law, with a prospect of certain loss.

M. T.



## No. XXIII.

CASE of ELIZABETH DUNN for FORGERY \*,  
with the OPINIONS of the JUDGES, at the OLD  
BAILEY SESSIONS; in OCTOBER 1765.

ELIZABETH DUNN was tried upon an indictment of forgery; for forging and uttering a false promissory note for the payment of 3l. 17s. as the note of *Mary Wallis*, the widow and executrix of *John Wallis*, with intent to defraud *Edward Hooper* the prosecutor.

It appeared in evidence,

THAT on the — day of — the prisoner applied to one *Edward Hooper* (who kept an office for receiving the wages of seamen), and represented to him, “ that her husband was a seaman in his majesty’s navy, and was lately dead, having considerable wages due to him; that he had made a will and appointed her his executrix, but that the fees in Doctors Commons amounted to 3l. 17s. which she had not money to pay, and therefore she desired the prosecutor to lend her that sum.” The prosecutor told her that he must have some certificate that she was the same *Mary Wallis*, the widow and executrix of the seaman; and till then he should not choose to lend her the money.

BEING thus refused, she went away; and in a few days afterwards came again to Hooper, and shewed him a probate (or pretended probate) of *John Wallis*’s will, appointing his wife *Mary Wallis* the sole executrix.

\* A very imperfect account only of this Case being hitherto extant, we have been favoured with the communication of the following as a desirable addition to our Collection.

The maker of a promissory note, who utters it as the note of another person, and thereby obtains superior credit, is guilty of forgery within the Stat. 2. Geo. 2. c. 25. s. 1.

Leach’s Cr. Cases, 61.

UPON this the prosecutor lent her the 3l. 17s. and his clerk drew a promissory note to be signed by the prisoner for the repayment of that sum. The prisoner set her mark to the note; and then Hooper's clerk (who attested it) asked the prisoner what name he must write over the mark? The prisoner replied, "Why, you know my name well enough, I told you before;" and thereupon the clerk wrote over her mark the words, *Mary Wallis, her mark* (the name she had called herself before). Upon this evidence the jury found the prisoner Guilty. But the recorder having doubts whether this was a forgery within the 2d Geo. II. he postponed passing sentence, and desired the opinions of the judges upon it. Accordingly, at a meeting of all the judges (excepting lord Camden and mr baron Adams), on the 6th of Nov. 1765, at Serjeants-Inn, the question was proposed to them.

St. 2. Geo. 2.  
Se. 15. C. 1.

MR. justice Aston was of opinion, that this was no forgery, but at most a mere *fraud* in assuming a false name. That to constitute a forgery, *the instrument itself* must be false; and the merely assuming of a fictitious name to it will not make the instrument itself a forgery. Put here the note was really and truly the note of the prisoner herself, and was given and subscribed by her as her *own* note in the presence of Hooper and his clerk; and though she subscribed it by a fictitious name, she might be sued upon this note as effectually as if she had signed it with her own true name, and consequently the prosecutor had his remedy upon it.

BUT the nine other judges were of opinion, that this was a capital forgery. They agreed, that in all forgeries the instrument supposed to be forged must be a false instrument in itself; and that if a person gives a note *entirely as his own*, his subscribing it by a fictitious name will not make it a forgery, the credit being there wholly given to *himself*, without any regard to the name, or without any relation to a third person.

person. But they thought that an instrument which is altered as the act and instrument of another, and in that light obtains a superior credit, when, in truth, it is not the act of the person represented, is strictly and properly *a false instrument*; for in that case the party deceived does not advance his money or accept the instrument upon the personal credit of the party producing it, but upon the name and character of the third person, whose situation and circumstances import a superior security for the debt: and therefore, if in truth it is *not* the instrument of that third person, whose name and situation induced the credit, it is certainly *a false instrument*, and the intention fraudulent to the party imposed upon by it; for he believed, when he accepted the security, that he had a remedy upon it against the third person, in whose name it was given, and on whom he relied when he advanced the money: but this being false he has no such remedy, and therefore is materially deceived. In this respect the case is very different from that of a person borrowing money upon his own note, and merely assuming a fictitious name, without any relation to a different person; for *there* the whole credit is given to the *party himself*: the lender accepts the security as the security of that person only; he has no other remedy in view but merely against the man he is dealing with; and the security itself is really and truly the instrument of the party whose act it purports to be, however subscribed by a fictitious name; he has therefore a remedy upon it against the person on whose credit he took it, and consequently is not substantially defrauded.

BUT in the present case no credit was given to the prisoner herself personally, for she was totally unknown both to Hooper and his clerk; the money was refused on her first application, and a certificate required that she was the same *Mary Wallis, the widow and executrix of the seaman*. It was not till she brought the probate, and from thence and her own representation appeared to be the

executrix of John Wallis (and as such intitled to his wages), that he would advance the money to her. In that character and capacity she gave the note, and virtually directed the clerk to write the name of *Mary Wallis* over her mark (as the name she had told him before); it was therefore upon the supposed note of *Mary Wallis*, the executrix of the seaman, that this money was advanced: by this note the prosecutor believed that he had a remedy against that executrix, and that the wages of her husband would be a fund for repaying him.

It now turns out that this was *not* the note of John Wallis's executrix, and that he has no remedy upon it against the person whose note it purported to be, and on whom he relied; it was therefore a *false* note, and as such within the words of the act of parliament.

WHETHER, in fact, there be any such person as Mary Wallis, executrix of John Wallis a seaman, is totally immaterial. If an instrument be false in itself, and by its purporting to be the act of another a credit is obtained which would not otherwise have been given, it is a forgery; though the name it is given in be really a non-entity. Ann Lewis's case, Foster 116. 1. Hawk. P. C. 210.

HAD the note in question been brought by the prisoner *ready signed* with the name of Mary Wallis, executrix of John Wallis, and had so obtained the money, it could hardly have been doubted but this would have been uttering a forgery.

AND what difference can it make that she signed that name (under the same misrepresentation) in the presence of the prosecutor, as the prisoner was an absolute *stranger* to him? He had no better means of knowing whether this was the note of *Mary Wallis*, than if she had signed it before she came thither. The falsity of the note and the fraud upon the prosecutor were precisely the same.

CASE OF ELIZABETH DUNN FOR FORGERY.

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UPON the whole, the nine judges abovementioned were of opinion, that the prisoner was liable to a sentence of death.

BUT at a subsequent meeting it was agreed, that as Mr. justice Aston was of a different opinion, it would be proper to recommend the prisoner to mercy.





A  
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The next Section treats of the subjects of contracts, arranging them in a natural order; but the most remarkable part of it is an examination of the case of *Slove and Webb*, on the Annuity Act [vol. I. from page 207 to 231.] in the course of which the author minutely investigates the principle of that determination.

In the following Section he considers the *general nature* of Contracts and Agreements, dividing them into Contracts executed and Contracts executory; and whether executed or executory, into express and constructive or implicative; simple or absolute and conditional; and lastly, written or unwritten. Under the last of these distinctions, he gives an account of the Statute of Frauds, and of all the Cases that have been agitated since that Statute; and endeavours to establish some leading principle as the criterion, whether the Statute attaches on the Contract or not.

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From this account, which consists of little more than the titles of the several Sections, the intelligent reader will, no doubt, conclude we have not complimented Mr. Powell too much with respect to the propriety of the arrangement.

In regard to the style, it will appear, on perusal of the passages above referred to, that it is easy and perspicuous.—Where indeed he is under the trammels of Cases and Citations from ancient books, we still see the phraseology of the lawyer, and it must be confessed that no small degree of attention is required in a treatise on any *particular* branch of municipal law to avoid it. By the phraseology of the lawyer we do not mean its technical terms, these must always be used, and by no means detract from the elegance of the composition;

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style thereon, the number of days of grace in different countries, the form of the instrument, and the origin of promissory notes.

Chap. II. points out, Who may make Bills of Exchange or Promissory Note, and be Parties in the Negotiation of them.

Chap. III. shews the Resemblance which Bills of Exchange and Promissory Notes bear to one another; and of their different kinds.

Under this head the Author shews the distinction between notes made payable to a man and his order, or to the order of such a man, or to such a man or bearer, or simply to the bearer; and points out the time at which such notes must be demanded.

Chap. IV. treats of the Privileges of Bills of Exchange and Promissory Notes, and the Circumstances necessary to make them good.

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Chap. V. treats on Acceptance.

And the Author discusses Acceptance under the following points of view:

"First, With respect to the manner, in which an Acceptance may be made: Secondly, The time of making it: Thirdly, The parties by whom and to whom it is made: Fourthly, Its different kinds: and, Fifthly, What shall amount to an Acceptance."

Chap. VI. On the Transfer of Bills and Notes.

Under this head the subject of indorsements is treated of, in all its various applications and effects.

Chap. VII. The Engagement of the several Parties.

Here the Author discusses the different degrees of responsibility of the drawer, the acceptor, and the indorser, and what is necessary to discharge them respectively from the obligations incurred by becoming parties to the instrument.

Chap. VIII. Of the Remedy on a Bill or Note.

Points out the forms of action applicable to the situation of parties differently interested in bills of exchange and notes of hand; and what is necessary to be stated in order to intitle the parties interested to recover thereon.

Chap. IX. Of the Proof necessary at the Trial, and of the Defence that may be set up there,

Collects into one point of view the general doctrine explained more fully in the preceding chapters, and contains also many other useful observations upon the subject: and herein the Author takes an opportunity of displaying the arguments on each side of the important question now pending in the house of



of lords, as to the effect of fictitious indorsements, and states the points proposed for the opinions of the judges.

The above is a general state of the matter contained in this work, in which Mr. Ryd has fully discharged his undertaking with the public, having given a clear, plain, perspicuous tract upon this important subject, so written and arranged as to be easily understood by persons of the most ordinary capacity, and at the same time to satisfy the most rigid critic in point of purity of style and classical composition. But we could have wished that a table of contents had preceded the work, by which the method in which the subject is treated would have been rendered immediately obvious to the reader, and, of course, the subjects under each distinct head of inquiry more readily ascertained. This we have here, in some degree, supplied.

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10. **THE PRACTICE of the COURT of KING'S BENCH in PERSONAL ACTIONS. Part I.** By WILLIAM TIDD, of the Inner Temple. Octavo. 4s. in boards.

After the various books that have been published on the practice of our courts, it might well be doubted, what could be attempted in any new work, and whether any thing could be added to the present stock; especially when we consider, that the practice of courts is a subject not capable, perhaps, of being treated perfectly in any book whatsoever. But the Author of the work in question has, in our judgment, made an attempt in which he has succeeded. This book differs in form from those which

which have gone before it. Those by *Richardson*, by *Harrison*, by *Crompton*, and others, have been sketched rather in the form of digests, dealing out the abstract of cases, with the authority subjoined, arranged under the different heads of practice. The merit of such method is not meant to be disputed; it is a plan that has the best digests of the law for examples; it is easy of access to the practitioner, and carries authority with every part of it.

But, with all its merit, the present Author has thought it advisable to desert this plan, and pursue another. He has aimed at the method followed by *Blackstone*, in his *Commentary*, and by *Marsden* and *Hynde*, in their books of practice in equity. He has compressed and moulded his materials so as to form out of them a flowing narrative. He opens and displays the various stages of a cause, in a style of composition that interests and fixes the reader's attention. At the same time that he insures a perusal of his work, by the form in which he has put it, he has not left it without the support of authorities; they seem to be cited very constantly for every point he lays down.

The present volume contains only a third part of the whole intended work; namely, the proceedings in an action previous to the plea. In another part it is intended to continue the proceedings, from the plea to the final judgment; and in a third part, to go on to *executions, writs of error, scire facias, replevin, &c. &c.*

He informs us, in his Preface, that the second and third parts are in a state of considerable forwardness; but on account of his professional avocations it may be some years before they are published.

We are very glad, on the Author's account, that he has so good a reason, although it will, in the mean time, be a loss to the profession. However, we are obliged to him for what he has already furnished us, as we have a prospect of possessing in this, a book altogether much more readable than any thing which has yet appeared on the practice of the king's bench; and this may be said, without throwing any discredit on others of established authority, and of merit peculiarly their own.

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It appears from the Author's Preface, that some considerable additions are made in this edition, particularly of the proceedings

ings by original *quare clausum fregit*, and in replevin; the mode of proceeding to trial by *proviso*, and instruction for preparing the brief and arranging the evidence at *nisi prius*; besides which, the work has undergone a thorough revision. Some passages that were exceptionable have been rectified, and others that were doubtful explained. The references also have been carefully examined, and the necessary corrections and additions are made.

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IT may be necessary to observe, that a primary object of the *COLLECTANEA JURIDICA* is to form a fund or repository for the reception of such occasional and fugitive law tracts as appear adapted to promote the extension of legal knowledge, and which might otherwise escape the general notice of the profession. In concurrence with this idea, the insertion in our last number, of a case in which some important difficulties had arisen, with the opinions of several eminent counsel of the present day, pointing out the proper mode of obviating these objections, was thought a desirable acquisition to the general purpose of our publication. It has, however, been suggested, that the insertion of the names of the parties, and the signatures of the respective counsel, might in cases of such recent date prove inconvenient, and liable to misconstruction: we shall therefore, in deference to the wishes and advice of our learned friends (notwithstanding the authority of respectable example and precedent), obviate in future any reasonable objection on that head, by omitting those names and signatures (unless in case of express permission), preserving only some mark of distinction to each, to prevent the confusion that would necessarily attend an indiscriminate collection of opinions from different hands.

A. Z.'s second favour is received, an answer to which is left as directed.

M. T. will appear in our next; and in a subsequent part of our publication, Hudson's History of the Court of Star-Chamber.

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The design of this work, as proposed in the Preface to it, is to afford to those who are not of the profession of the law, a clear and succinct digest of the laws on the subject, divested as much as possible of technical expressions and professional idioms, and arranged in such order that the several parts may become perspicuous and familiar to every capacity.

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The law on the subject of Impeachment does not appear hitherto to have been treated of so fully as the subject seems to require; and notwithstanding the comprehensive title above recited, and the copious additions that are made to this second edition, there seems room to believe that other precedents may be produced on this at present much controverted topic, of considerable weight and authority towards the decision of this constitutional question, though wholly unnoticed in the above publication.



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It is generally understood that the practice of this branch of the Court of Exchequer has of late years considerably increased, as well from the circumstance of a more general knowledge which has obtained of the course of the practice therein, as from the modern alterations which have taken place under the authority of the court, by which the process is more assimilated to the practice of the other courts, and in some instances affords a more advantageous and eligible course of proceeding for the interests of the suitor and agent. The present volume contains a variety of information supplementary to the matter contained in the former volume relating to the antient practice, with the alterations which have of late years been made by the new rules of the court which now regulate the business of the Office of Pleas.

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## TO CORRESPONDENTS.

*WE are further indebted for several valuable Communications, in Addition to our Stock of Original Materials, which shall have place in the Course of the ensuing Volume. The judicious Observations and Hints of our Correspondent N. P. shall be attended to consistently with other Objects which require Consideration. The Letter of D. B. C. is received, and shall be noticed agreeable to his Directions.*

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## To the BINDER.

*IN binding up the several Parts of this Volume, it is intended that the Pages within Brackets, containing the Register of Law Publications, should be placed in regular Order at the End of the Volume.*









